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CURRENT EVENTS.

TRUSTS—AGAIN.—Since we published our article on "Trusts"[1] our attention has been called to a very recent decision of the Supreme Court of Tennessee, which fully sustains our view of the legal *status* of these hitherto nondescript combinations. We have not seen a full report of the case, but have perused with much interest a newspaper report of the opinion.

It seems that three or more "oil companies" of Memphis formed a combination in the nature of a trust, and, without parting with the title to their property, committed the conduct of their business to a board of managers. One of the companies desired to withdraw, and the suit was brought to prevent its withdrawal. The court held that the attempted combination was a partnership, that neither of the corporations had by its charter any power, express or implied, to enter into a partnership, that their acts in forming it were *ultra vires* and void, and that, of course, any member of the illegal combination had a right to withdraw from it.

The newspaper further says that the court intimated that the acts of these corporations in forming such an illegal combination, being *ultra vires*, operated as a forfeiture of their franchises, but as that question was not before the court the remark was merely an *obiter dictum*. It tends to foreshadow, however, what the action of the court would be if that question were properly brought before it.

A further important consideration has been suggested in this connection. If the worst, in legal contemplation, shall befall a trust, it shall be declared a partnership so far as it concerns parties capable of forming a partnership. If the corporations which have originated or participated in it shall be held to have acted *ultra vires*, and the trust shall have contracted debts and come to grief financially, the question remains—what are the remedies of its creditors, and against whom can they be enforced? Can the stockholders of the sinning corporations be made to pay for the misdeeds of their directors done in violation of their duty and in excess of their authority? Can the individuals who originally entered into the combination, or after its formation became interested in it by the purchase of certificates of trust, or otherwise, be deprived of the powerful aid of their allies, the corporations, and left to bear the brunt of all the legal artillery of the creditors of the trust? And, finally, have parties who have given credit to an illegal combination, formed in part of corporations, of the powers of which under their charters they had or might have had full notice, any remedy at all for their misplaced confidence?

These considerations open a vista of vast possibilities in case the pending and approaching litigation shall result in the bouleversement of the trust system.

It has been suggested that there is no necessity for legislative provision for the punishment of persons who combine to raise the prices of commodities of general use and prime necessity; that such action is a conspiracy at common law, and may be punished as a misdemeanor. We are aware that there have been decisions to that effect, but we may be permitted to doubt whether their authority has been sufficiently recognized to preclude the necessity of legislative action in that direction if an effort be seriously made to suppress the system of trusts. If that system is as great an evil as it is alleged to be, and if public interests so imperatively demand its abrogation, and on these points we express no opinion, its demolition will require stronger action than can be found in penal laws which were formulated and grew up in non-commercial ages, which are imperfectly systematized, and which for generations have fallen into a condition of "innocuous desuetude." If it is seriously contemplated that an onslaught shall be made by the State or National governments, or both, upon the system of "trusts," it should be borne in mind that the adversaries to be encountered are vast masses of aggregated capital, completely organized, and fully supported by numerous corporations, many of them improvidently endowed by their charters with extraordinary powers, and still further by long continued,

[1] *Ante*, p. 205.

unbroken commercial customs of buying in the lowest and selling in the highest markets, of pooling, combining, "cornering," irrespective of the nature of the commodity dealt in, of the interests of consumers and of the community, and of the public welfare.

UNNECESSARY EXPOSURE TO DANGER.—One of the London legal journals has been examining the question how far a man may expose himself to unnecessary danger without incurring legal penalties,

A number of gratuitous perils are enumerated, as ascensions in balloons—captive or free—feats with parachutes, rope-walking, trapeze performances and others. The conclusion arrived at is that the people employed in this manner incur no penalties unless they create a nuisance, except in the case of a descending balloon in which the æronaut commits a technical trespass in returning to earth.

We have never before seriously considered this subject, regarding all persons who seek danger, except at the call of duty, as within the especial jurisdiction of that mythical functionary, the "fool-killer," nevertheless we have something to say, a little more serious, on the subject.

We think the same principle of law which makes suicide, or the attempt to commit it, or counseling its commission a felony, and which interdicts prize-fighting, should be extended so as to cover all cases of exposure to unnecessary peril, incurred for the sake of gain and for the gratification of a morbid public taste. That taste, the enjoyment in witnessing exposure to peril of death, is a relic, if not of barbarism, at least of paganism, and is, though much diluted, fairly descended from such savage propensities as the delight which animated the ancient Romans, when the conquered gladiator was slain by the victor in obedience to the mandate expressed by the down-turned thumbs of Roman ladies and gentlemen.

It is a matter of very serious question with us whether the motive which in reality prompts men and women to crowd in throngs around one who stands for their gratification in danger of an immediate and terrible death is really admiration for his courage and address, or a morbid secret desire to see the act result fatally, and witness in reality the same kind of tragedy which nightly attracts so many thousands to the theaters to witness in mimicry. Of this sort of feeling, of course, every person who with pleasure looks on at this variety of feats is profoundly unconscious, but it may be none the less real and a remnant of our savage instincts lingering under the gloss of our civilization. And in this point of view it may be asked, is it not the province of the law to protect as well the morals of the community as the lives of the persons imperiled in such hazards? The law prohibits prize-fighting, but not so much on account or the technical breach of the peace which the combatants commit in pounding each other as the demoralization of those who witness the disgusting spectacle. In the case of the prize-fight there is comparatively little danger to life, and yet the law interdicts it. And why should not practices involving far more peril be subjected to stern prohibition enforced alike against the performers, the promoters and the witnesses of the exhibition.

NOTES OF RECENT DECISIONS.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT—HUSBAND AND WIFE.—The Supreme Court of New Hampshire has recently decided a case,[1] in which it declares the doctrine of equity in cases in which specific performance is demanded under circumstances that render such performance either really or apparently inequitable. The facts were that a husband and wife were jointly entitled to a sum of money due them as pension money, the whole, however, standing in the name of the wife. He drew part of the money and executed an instrument under seal in the shape of a receipt for $550, and stipulated that it should be in full of all demands on his part on the pension money jointly owned by him and his wife, and of the further payments thereafter to be made by the government. The receipt further stipulated that, in consideration of the $550, he released all claim that he might have as heir at law and distributee against the estate of his wife if he

[1] Eaton v. Eaton, S. C. N. H., July 19, 1888, 14 Atl. Rep. 867.

should survive her. He did survive her, and this action was between him and her children, they claiming that the agreement to renounce his inheritance should be specifically performed. The court held, that there was no consideration for his promise to renounce his inheritance. The court adds: "Specific performance is inequitable; and the facts show no ground for an exception to the rule that inequitable performance is not specifically enforced.[2] 'In general, it may be said that the specific relief will be granted when it is apparent, from a view of the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient * * * to call forth the equitable interposition of the court that the legal obligation under the contract to do the specific thing desired may be perfect. It must appear that the specific enforcement will work no hardship or injustice; for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result.'[3] The validity of the defendant's release of his right to a distributive share of his wife's estate is a question that need not be considered."

[2] 1 Pom. Eq. Jur. § 400; 2 Story, Eq. Jur. §§ 742, 750, 769; Powers v. Hale, 25 N. H. 145, 152; Pickering v. Pickering, 38 N. H. 400, 407, 409; Eastman v. Plumer, 46 N. H. 464, 478, 479.

[3] Willard v. Tayloe, 8 Wall. 557, 567.

DEED—COVENANT—SEIZIN.—The Supreme Court of Minnesota has found it necessary to decide in a recent case,[1] that a party who accepts a deed with the usual covenants of seizin and warranty conveying to him land to which he has already a good title and lawful seizin and actual possession, cannot recover damages for the breach of thecove nant of seizin in that the grantee and not the grantor had actual seizin at the date of the deed. The facts are not stated in the report of the case, and it is a little hard to understand what reason he had for bringing the action, unless, indeed, it was to recover back money which he had been fraudulently induced to pay for his own property. The court disposed of the question in a brief opinion, saying:

"MITCHELL, J. Where, at the time of the conveyance, the purchaser has in himself the valid title to the premises, he cannot sue on the covenants it contains, for they only extend to a title existing in a third person which may defeat the estate granted by the covenantor. They do not embrace a title already vested in the covenantee. 'It never can be permitted to a person to accept a deed with covenants of seizin, and then turn around upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed he himself was seized of the premises.[2] This is decisive of the only point in this case. Had the plaintiff been induced through fraud to accept a deed of his own property, or had he done so in ignorance of the facts affecting his own rights, he might have been entitled to some form of relief. But no such suggestion is made either in his pleadings or his proof. He predicates his right to recover solely upon the covenant of seizin."

[1] Horrigan v. Rice, S. C. Minn., June 26, 1888, 38 N. W. Rep. 765.

[2] Fitch v. Baldwin, 17 Johns. 161; Beebe v. Swartwout, 3 Gilman, 179; Furness v. Williams, 11 Ill. 229; Rawle, Cov. § 268; Bigelow, Estop. 346.

STATUTORY LIABILITY OF WIFE FOR NECESSARIES FOR FAMILY.

Under the common law, husband and wife were but one person, and the husband was that one. The common law implied not only a unity of person but a unity of interest, and the unity of interest was also represented by the husband,[1] and therefore no action at law could be maintained against a married woman upon any contract into which she might enter.

A declaration in an action of *assumpsit* against husband and wife, alleging a request and promise by husband and wife during coverture is bad, for the wife cannot be sued upon a mere personal contract made during coverture, although joined with her husband.[2] And a judgment rendered against husband and wife, upon a warrant of attorney exe-

[1] Krouskop v. Shontz, 37 Am. Rep. 818

[2] Edwards v. Davis, 16 Johns. 281.

cuted by husband and wife, is void in respect to the wife.[3] It has also been held that a court of equity would not render a personal decree against a married woman upon a contract entered into by her.[4] While a court of equity will enter a decree, upon a contract made by a married womam with respect to her separate estate, to be enforced against such separate estate, yet she is not personally liable on such contract.[5] She cannot, previous to the decree dissolving the marriage, make any valid agreement as to her allowance for alimony. And the court will not sanction any such agreement, unless it satisfactorily appears that the allowance made in her favor is as much as she is fairly entitled to.[6] Numerous authorities might be cited to sustain these propositions, but they are elementary and generally understood.

Bishop lays down the rule thus: "Being under the power of her husband, she can have no will of her own, and by reason of this lack of freedom of will she cannot contract. Not only she cannot enter into a contract with her husband, as laid down in the last chapter, but she cannot with any other person. Any form of contract which she may make is, as to her, a mere nullity."[7]

If she had no separate estate no relief whatever could be granted; and, if any decree should have been entered, it would have been of no value, for it could not bind after-acquired property. Therefore creditors were compelled to look, almost exclusively, to the person and property of the husband, who represented the unity of husband and wife in person as well as in property. As an offset to this, however, all of the wife's personal property, her choses in action when reduced to possession and the rents, issues and profits of her real estate, when received, were vested in her husband, and the husband became liable, to some extent at least, for the debts of the wife and her antenuptial contracts.

Statutes have been passed by the legislatures of many of the States, which were intended to relieve married women from the enforced thrall of the common law, to remedy its evils and defects, and to settle upon a fairer, more liberal and just basis their legal *status* as to contracts, property and property rights, and to define and extend the remedies that might be pursued by creditors against them and their property; and in some States a woman may now be sued in the courts of law and a personal judgment rendered against her, which will bind her property to the same extent as a judgment against a *feme sole*, and on which an execution in the usual form may be issued.

In Yale v. Dederer,[8] the court of appeals held, that "in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself."

In Cushman v. Henry,[9] it was held that, where a married woman, having at the time no separate estate, purchased real property, and as part of the consideration therefor assumed and agreed to pay a mortgage then resting thereon, she was liable to a personal judgment for any deficiency after applying the proceeds arising from a sale of the property under a proceeding to foreclose said mortgage. The same doctrine, in substance, was announced by the Supreme Court of Tennessee, in Jackson v. Rutledge,[10] where it was held that "a married woman, accepting a conveyance of land to her separate use, reserving a lien for unpaid part of purchase money, is bound by the conveyance, and cannot recover her payments, and the lien may be enforced."

The case of Cushman v. Henry, was a New York case, and yet the court was not willing to be bound by the decision in Yale v. Dederer, *supra*, and did not require the intention to charge her separate estate to be declared in the contract itself, and, as a matter of fact, at the time Mrs. Cormac assumed and agreed to pay the mortgage, she had no separate estate.

In Deering v. Boyle,[11] the Supreme Court of Kansas say: "When a married woman executes a promissory note in payment and satisfaction of her husband's debt, an action may be maintained against her on said note, and her separate property applied in pay-

[3] Brittin v. Wilder, 6 Hill, 242.
[4] Young v. Paul, 10 N. J. Eq. 401.
[5] Gardner v. Gardner, 7 Paige Ch. 112.
[6] Daggett v. Daggett, 5 Paige Ch. 509.
[7] 1 Bishop on Married Women, § 39.

[8] 22 N. Y. 450.
[9] 31 Am. Rep. 437.
[10] 3 Lea, 626.
[11] 12 Am. Rep. 480.

ment of the same, even without showing that it was intended to charge such estate;" and this doctrine has been adhered to in that State.[12]

I am unable to find any good and valid reason for upholding the decision in Yale v. Dederer, and requiring the intention to bind the separate estate to be contained in the contract. When a married woman enters into a written contract to pay money, she expressly promises to do so; and when she enters into a contract, from which the law implies a promise to pay, she impliedly promises to do so. In either case she promises to pay. It is not to be presumed that she intended to pay out of the property of some third person, but that, at the time she made the contract, she really intended to pay according to the terms of her contract, and therefore to pay out of her own property. The simple fact that she entered into the contract, and thereby promised to pay, ought to be sufficient evidence of her intent to bind her separate estate. She could not pay in any other way. On this point, in Phillips v. Graves,[13] the Supreme Court of Ohio say: "Her intention to charge her separate property, at the time the debt is incurred, may be either expressed or implied. Such intention may be inferred from the fact that she executed a note or other obligation for the indebtedness." This case was followed and approved in Williams v. Urmston,[14] where it is said: "Where a married woman, having a separate estate, executes a promissory note as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment." This case cites in it support Bell v. Kellar,[15] Cowles v. Morgan,[16] Burnett v. Hawpe's Ex'r.,[17] and The Metropolitan Bank v. Taylor,[18] each of which seems to support the principal case.

In Andrews v. Mathews,[19] the court say: "A promissory note made by a married woman jointly with her husband, for no other consideration than a debt of his to the payee, binds her." And in Kenworthy v. Sawyer,[20] the court held that the wife of one of the partners of a firm could bind herself by indorsing a note for the accomodation of the firm. The uniform holding of the Supreme Court of Wisconsin has been that a married woman was bound by her contract, express or implied.[21]

These decisions have been based on general statutes relative to married women and their property. But several of the States have adopted statutes substantially as follows: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly and separately;" and under these statutes several important questions have arisen. They are: 1. If, at the time the expense is incurred, it is charged directly to the husband, is the wife also liable? 2. If, after a time, a settlement is had and the individual note of the husband is taken, can the wife and her property be also held responsible? 3. If, after the note of the husband has been taken for such expense, it should be transferred to a third person, can such third person look to the wife for payment of the claim?

It is apparent, to my mind, that it was the intention of the law makers that the property of both husband and wife should be held liable for the expenses incurred in the support of the family, and the creditor could pursue his remedy against the property of either or both, notwithstanding the charge might be made against one only. If this be not the true construction of the statute, it is meaningless. If it should be held that, because the expenses were charged to the husband the creditor had thereby elected to hold him only responsible, then the property of the wife would not be liable; and the converse of this would also be true. Nor would the property of both be liable, but only the property of the one against whom the expense had been charged. This construction would not give the statute that liberal inter-

[12] Wicks v. Mitchell, 9 Kan. 89.
[13] 5 Am. Rep. 675.
[14] 35 Ohio St. 296.
[15] 13 B. Mon. 381.
[16] 34 Ala. 535.
[17] 25 Gratt. 481.
[18] 62 Mo. 338.
[19] 124 Mass. 109.
[20] 125 Mass. 125.
[21] Conway v. Smith, 13 Wis. 125; Todd v. Lea, 16 *Id.* 480; Leonard v. Rogan, 20 *Id.* 540; Mahler v. Wise, 23 *Id.* 300; Myers v. Rahte, 46 *Id.* 658; Dayton v. Walsh, 47 *Id.* 113. See also Dobbin v. Hubbard, 65 Am. Dec. 25.

pretation to which it is entitled, and it would be contrary to both the spirit and the letter of the law. The statute is remedial in its nature, and should receive a liberal construction so that the object for which it was enacted might be attained. Prior to the passage of the act the property of the husband was at all times liable for the payment of the expenses of the family, but that of the wife was not unless she incurred the expense on her own credit and the charge was made directly against her; and even then it was very doubtful whether or not she could be held responsible. But the intention of the legislature was, undoubtedly, to extend the remedy so as to include also the property of the wife and render it liable, notwithstanding the charge might be made against the husband only. But we are not left to grope our way in the field of speculation on the construction to be given to this statute. These questions have been submitted to and passed upon by the courts, and we are guided by the judicial construction placed thereon by the eminent judges who constitute those courts. The first question has been answered in the affirmative in Lawrence v. Sinnamon.[22] In that case the court says: "The husband is the head of the family. He determines primarily what is needed for it. He buys, furnishes, contracts debts, all in his own name, for the support and welfare of the family. Her name need not be known. In the absence of fraud and collusion between the creditor and the husband, or some other circumstances giving the wife peculiar equities, these debts, though contracted by the husband, to the extent of their property, bind both, and his acts, agreements and promises are alike obligatory upon both. * * * Our law is liberal in protecting the rights of the wife in relation to her property, real and personal. But it has not gone so far as to abolish the headship of the family, nor to take from the husband the right to exercise best judgment and discretion in the management of his affairs. They are alike interested in the education of the children and for the support of the family. For the expenses thereof it is both right and proper that the property of each or both should be liable. She, as a rule, must be governed by his contracts in relation to these matters. The law does not contemplate the consent and action of both. The merchant, grocer, miller, or teacher need not wait until she joins with him in the request for credit, or before making a contract to furnish articles for the family or the education of their children. But they may contract with him as one whose being is not merged in that of his wife, and whose contracts, within the provisions of the statute, are chargeable upon the property of both."

In Smedley v. Felt,[23] the court say: "The vender may be ignorant of the manner in which the property of the parties is held, and may suppose that the husband has enough property to meet the obligation, and he may mentally extend credit to the husband upon his supposed responsibility. Yet if he should do so, and it should afterwards be ascertained that all the property was held by the wife, she should not escape liability to the extent of her property for contracts of which she and her family have derived the benefit."

In the case of Watkins v. Mason,[24] the Supreme Court of Oregon decided "that the wife may be compelled to pay for goods sold for family use and used in the family, although sold to the husband on his individual credit." It seems therefore that the wife is held to be responsible, and it is immaterial that the contract was made with the husband, the goods were charged and the credit extended to him. The second question then is, does the taking of the note of the husband alone discharge the wife from liability?

The general rule is that the giving of a note is not the payment of an account, but it is only changing the evidence of the indebtedness, unless there is an agreement that the note shall be accepted as payment;[25] nor is the giving of one note in renewal of another payment of the old note.[26]

The case of Lawrence v. Sinnamon, *supra*, was as follows: The plaintiff, between April 1, 1857, and January 2, 1858, sold and delivered to Sinnamon goods for family use, and in January, 1858, to balance his books, and as evidence of the indebtedness took

[22] 24 Iowa, 82.

[23] 41 Iowa, 591.

[24] 11 Oreg. 72.

[25] First Nat. Bank, etc. v. Newton, 14 Pac. Rep. 428, and autorities cited on pages 432 and 433; Geib v. Reynolds, 35 Minn. 331.

[26] Fry v. Patterson, 10 Atl. Rep. 390.

the note of said Sinnamon, and on the 15th day of November, 1866, commenced suit against Sinnamon and wife thereon. The defendants demurred on the ground that the cause of action was barred by the statute of limitations. and the demurrer was sustained by the trial court; but the supreme court reversed the judgment, not only holding that the wife was bound by the note, but holding also that, although, if no note had been given, the cause of action on the account would have been barred by the statute; yet, the note binding the wife, the statute began to run against her from the time said note became due, and not from the date of the last item of the account. This holding, that the wife, was bound by the note, was affirmed in Smedley v. Felt,[27] and the doctrine was reaffirmed in the cases cited in the note below.[28]

In Frost v. Parker, the court say: "It (the liability of the wife), continues as long as a right of action exists against the husband. He may change the form of the evidence of the debt; * * * the debt, enforceable at law, continues, and with it the wife's liability." The second question is therefore answered in the negative. The third and last question is, "does the transfer of the note to a third party relieve the wife from liability for the debt?"

It is a general rule of law, which I presume will not be questioned, that where a liability is joint, or joint and several, and the debt, or the evidence of the indebtedness, is transferred, the assignment carries with it all the rights of the payee and all the duties and liabilities of the payors. When the payee of a note assigns it to a third person, he transfers to that person all of his rights in and to the indebtedness of which it is the evidence, and the maker of the note can set up against the assignee no defense as to the consideration for which it was given, or his liability to pay, which he could not have pleaded in an action by the payee; and if the note is purchased before maturity, he who purchases in good faith, for value and in the ordinary course of business, can, as to some defenses, recover thereon, when the payee might not be able to do so; but, if the note was past due, the assignment would be "without prejudice to any set-off or other defense existing at the time of or before notice of the assignment."

Then, if it be true, as was said in the case of Smedley v. Felt, *supra*, that "the husband may make the contract without using the name of his wife, and may give his individual note, for the discharge of which the property of both will be liable," why should not her property be liable for the discharge of the note in the hands of one who purchases in good faith and for value, as well as in the hands of the payee? Surely her property is liable, not to the payee only, but for the discharge of the note in whosesoever hands it may be, for the payment of the claim for family expenses to any person who may be the legal owner and holder thereof. The statute makes her property liable for family expenses, but does not say that it shall be liable only while the claim is held by the person who furnished the necessaries for the family. Who then is authorized to interject into it a clause making that liability conditional and dependant upon the ownership of the claim being retained by the original party, and affirming that her liability shall cease and determine the moment the claim is assigned? If it had been the legislative will that such should be the law, the necessary provisions to that effect would most assuredly have been made in the statute itself. The assignment of the vendee's note for the purchase price of real property carries with it the right to enforce a vendor's lien against the property sold, provided the assignor, at the time of the assignment, had the right to enforce such lien.[29] In other words, the assignment of the note carries with it in equity to the assignee the authority to enforce the equitable right incident to it, provided the assignor could have enforced such right. The assignee gets all the equitable rights the assignor had, and has the same remedies against the payee as the assignor. Why, then, should he not, as a matter of a law, get all the legal rights which his assignor had, and why is he not entitled to judgment against any person against whom his assignor could have obtained judgment? It seems to

[27] 41 Iowa, 591.

[28] Marquardt v. Flaugher, 14 N. W. Rep. 214; s. c., 60 Iowa, 148; Phillips v. Kirby, 34 N. W. Rep. 855; Davidson v. Beggs, 16 N. W. Rep. 135; s. c., 61 Iowa, 309; Frost v. Parker, 21 N. W. Rep. 507; s. c., 65 Iowa, 178; Black v. Sippy, 16 Pac. Rep. 418.

[29] Burkhart v. Howard, 14 Oreg. 39.

me that the cases are parallel, and that that which is equity in one case should be law in the other.

The case of Frost v. Parker, was one in which it appeared that the husband had bought the goods and afterwards gave his note for the amount due. The payee sued thereon, judgment was rendered against the husband alone, and that judgment was assigned to a third person, who commenced a suit in equity to subject the wife's real property to the satisfaction of said judgment. In this case, of course, the note had been merged into the judgment; and it was contended on behalf of the wife that the assignment of the judgment against the husband did not carry with it the right to subject the property of the wife to the payment thereof; but the court say: "The action cannot be defeated on the ground that no assignment of the claim against the wife is shown. The wife was not a party to the original contract, nor to the note. She was not a party to the action wherein the judgment was rendered. The evidence of the debt was changed from an oral contract to a note, and from the note to the judgment. The debt all the time continued the same. This debt was continually enforceable against the wife's property. Her liability followed the debt. An assignment of the claim as against her, therefore, is not necessary to authorize plaintiff to bring this action," and in support of the conclusion thus reached the case of Lawrence v. Sinnamon, in which the court say:[30] "The expenses are in the nature of equitable charges upon the property of each. The fact that the form of evidence of indebtedness is changed from an account to a note makes no difference, unless indeed there was an agreement or understanding that the creditor looked alone to the husband, a fact which is expressly rebutted by the averments of the petition. It is not unlike a mortgage executed by husband and wife to secure the note of the husband. The renewing of the note by the husband does not discharge the lien."

If it be true that such expense is in the nature of an equitable lien upon the property of the wife, and not unlike the execution of a mortgage by husband and wife upon the separate property of the wife, then the wife, to the extent of her separate estate, is made by the statute the surety of the husband for the payment of the debt, and she is entitled to all of the rights and privileges, and subject to all the liabilities, of a surety.[31] A surety cannot complain of the transfer by the payee of the indebtedness for the payment of which he is liable. He is responsible to the transferee to the same extent as to the payee, and the assignee has all the remedies against him to which the payee was entitled. The Iowa court held that the property of the wife was liable although the husband had been discharged from all legal responsibility by proceedings in bankruptcy.[32] In Pennsylvania, the debt must be contracted by the wife, and the pleading must not only so show, but it must also show that the debt was incurred for articles necessary for the support of the family of the husband and wife.[33] The decision of these questions depends upon the construction of the statute, and I am of the opinion that the wife is, by the provisions of the law, a principal debtor, and not a surety only for the debt of the husband. She can be sued alone, or jointly with her husband. It is not necessary that the creditor should proceed against the husband in the first instance, and exhaust his remedy as to him before proceeding against the wife. He can look to the wife alone, and let the husband go. "For family expenses she may be sued jointly with her husband, or separately, and a personal judgment rendered against her."[34] I think, therefore, that the transfer of the note does not release the wife.

D. R. N. BLACKBURN.

[30] 24 Iowa, 82.

[31] Gray v. Holland, 9 Oreg. 512; Hubbard v. Ogden, 22 Kan. 363.

[32] Jones v. Glass, 48 Iowa, 345.

[33] Fell v. Brown, 8 Atl. Rep. 70.

[34] Phipps v. Kelly, 12 Oreg. 213; Black v. Sippy, 16 Pac. Rep. 418.

INSURANCE — CONSTRUCTION OF POLICY — LIVE STOCK—LIGHTNING CLAUSE.

DE GRAFF V. QUEEN INS. CO.

Supreme Court of Minnesota, June 12, 1888.

1. *Insurance — Construction of Policy.*—A condition in an insurance policy must be clear and unambiguous, and any reasonable doubt as to the meaning must be resolved in favor of the insured. The construction must be with reference to the nature of the

property insured, the purposes to which it is ordinarily put, and the manner in which it is usually kept, so as to give the conditions a meaning reasonably applicable to the kind of insurance upon that particular species of property.

2. *Same — Live Stock — Removal of — Lightning Clause.*—A clause in a policy of insurance against fire and lightning covering, among other property, live stock in a certain barn, and providing that the company "shall not be liable for more than the sum insured, nor the interest of the insured, except as hereinafter provided, as specified, upon the property described, in the places herein set forth, and not elsewhere," is not a promissory stipulation or condition of insurance, but is mere matter of description for identification, and the company is liable for the death of such live stock by lightning while in another barn on the same farm.

MITCHELL, J., delivered the opinion of the court:

This was an action on a policy of insurance to recover the value of a brood mare which was killed by lightning, April 20, 1886. The policy was issued in November, 1882, to plaintiff's testate, the owner of the farm described, and insured him, for the period of five years, against lost or damage, by fire to the property described, to the amount of $7,500, distributed as follows: $1,000 on his one and one-half story wood dwelling; $250 on his household furniture therein; $3,000 on his wood barn; $2,500 on live stock therein; $750 on his wood hog-house—all situated on N. E. quarter, section 4, township 107, range 24, township of Aulton, Waseca county, Minn. It was stipulated in the policy that it should cover loss or damage by lightning, whether fire ensued or not. The policy also provides "that the said company shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified, upon the property described, in the places herein set forth, and not elsewhere." At the time this policy was issued, the live stock on the farm (including this mare), when housed, were usually kept in the barn described in the policy, but were turned out to pasture during the summer. After the policy was issued, and shortly before the loss, the insured built upon the farm a new barn, 200 or 300 feet distant from the old one. Four or five weeks before the loss, he put the mare in the new barn, where she remained until killed by lightning. The insured testified that this removal was temporary; but he stated no definite time when he intended to return the mare to the old barn, and the evidence shows that the only reason for the change was one of convenience in caring for the animal. No claim is made that the risks insured against were greater in one barn than in the other. The contentions of the appellant are (1) that, under the policy, the mare remained insured only when in the wood barn described, and not elsewhere; and, (2) even if the policy is not construed thus strictly, she would remain insured only while removed temporarily for some purpose incident to the ordinary use and enjoyment of the property, and that the removal to the new barn, for a period of several weeks for no particular reason except the matter of convenience, was not a temporary but a permanent removal. Under the view we take of the case, both of these contentions can be disposed of together. The appellant rests his construction of the policy mainly upon the two clauses which we have italicized.

In the construction of such policies, there are two elementary rules: First. The language of a condition in a policy being that of the insurer, selected by him, and intended for his benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in in favor of the insured. The tendency of such stipulations is to narrow the range of the underwriter's principal obligation; and, again, if the meaning is ambiguous, it is his own fault in not making use of more definite terms in which to express it. Chandler v. Insurance Co., 21 Minn. 85; Loy v. Insurance Co., 24 Minn. 315; Cargill v. Insurance Co., 33 Minn. 90, 22 N. W. Rep. 6; Boright v. Insurance Co., 34 Minn. 352, 25 N. W. Rep. 796; Olson v. Insurance Co., 35 Minn. 432, 29 N. W. Rep. 125. A second rule is that the language of a policy must be construed with reference to the nature of the property to which it is applied. Such policies must be presumed to have been made with reference to the purposes for which such property is ordinarily used, as well as the manner in which it is usually kept. Halbrook v. Insurance Co., 25 Minn. 229; Boright v. Insurance Co., *supra*. It may be added, as within this rule, that the terms and conditions of a policy should be construed, if possible, so as to give them a meaning reasonably applicable to the kind of insurance upon the particular species of property insured. Turning now to the two clauses in the policy relied on by appellant, and taking up the last one first, we remark that, after much consideration and discussion, we have been unable to arrive at any certain or satisfactory conclusion as to what it does mean, except that the clause quoted, taken as a whole, was intended to make assurance doubly sure that the policy was a "specific" and not a "blanket" one. Appellant construes the expression, "as specified, upon the property described, in the places herein set forth, and not elsewhere," as meaning that the property remained insured only while in the wood barn, and not elsewhere. But, in framing this proposition, counsel himself finds it necessary to use the words "only" and "while;" neither of which, nor their equivalents are to be found in the clause itself. If it was intended to insert any such condition in the policy, it ought to have been so expressed that "he who runs may read." The clause is, at least, equally susceptible of the construction that the expression, "as specified, upon the property described, in the places herein set forth," refers back to the description of the property given in the previous

portion of the policy, so as to limit the insurance and the several amounts, respectively, to the property already described as in those places, and that the expression "and not elsewhere" is added merely to express in negative form what is already expressed affirmatively. If it will reasonably admit of such a construction, it must be adopted in favor of the insured. So construed, it neither adds to nor takes from the force of the description first given, viz., "live stock therein," and the policy may be construed as if this was the only statement as to the location of the property.

In this case a single form of policy is used to cover two kinds of risk, viz., fire and lightning; and to cover three classes of property, viz., buildings, which are fixed and immovable; household furniture, which although movable, is ordinarily kept and used permanently in one place; and, lastly, live stock, which from its very nature must necessarily change its location from time to time. The form of policy here used is an ordinary fire policy, adapted more especially to insurance of inanimate property against fire, but made to cover live stock, and having a "lightning" clause inserted. Hence, words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to another class of property, or as to the other kind of insurance, it might be construed as mere description for the purposes identification. This action is to recover for the loss of live stock by lightning, and the language of the policy must therefore be construed as applied to insurance upon that particular species of property. The parties must be presumed to have known that danger from lightning exists almost wholly in the summer, when live stock is out in the fields. No man of common sense would take a policy of insurance against lightning which only covered his stock when in a particular barn. Such stock cannot well be, and is not usually, kept permanently in a building. The ordinary uses to which it is put forbid it; and the usual and proper treatment of it requires that it be turned out to pasture about one-half the year at least. According to the usual course of farming operations, it is not customary to treat an animal, even when housed, as attached to some particular building, as a part of its contents, but to change its place of stabling from time to time, as necessity or convenience may require. The parties must be presumed to have had all these facts in view when they made this contract. If appellant's contention be correct, this policy would not cover a loss occurring while the stock is out at pasture, during the summer, for that could hardly be called a temporary removal from the barn for some temporary purpose incident to the ordinary use and enjoyment of the property. Again, the property was insured for five years. Suppose the barn described in the policy had been destroyed the next day after the policy was issued, according to appellant the insurance on the stock would have terminated forever. Any such construction would defeat the main purpose of the contract.

In view of these considerations, our conclusion is that the statement in the policy that the stock was in the barn is not a promissory stipulation on the part of the insured, or a condition of insurance on part of the insurer, that such location should remain unchanged, but, as to that class of property, and as to that kind of insurance, at least, is mere matter of description for identification of the property insured, indicating that it was the stock which was usually kept in that barn at that time. Everett v. Insurance Co., 21 Minn. 76; Holbrook v. Insurance Co., 25 Minn. 229. In this view of the case it becomes wholly immaterial for what purpose or for what length of time the mare was removed from the old barn to the new. In changing her location from one barn to another on the same farm as convenience required, the insured was treating her precisely as any farmer would and might do in the ordinary way of managing stock.

Order affirmed.

NOTE.—Authorities almost too numerous for citation may be found in support of the general rule for the construction of policies of insurance substantially as it is laid down in the opinion in the principal case.[1] "In all cases," says Mr. Wood, "the words of a policy are to be taken most strongly against the insurer."[2] But this rule is to be applied only where there is doubt as to what the intent of the parties was, as evidenced by the language used.[3] And, in general, contracts of insurance are to be interpreted according to the rules applicable to other contracts.[4] The words of the policy will be given their plain, natural, and ordinary meaning, unless there is something to indicate that they should be given some other meaning in the particular case.[5] The intention of the parties with reference to the indemnity of the insured is the ultimate object of the construction.[6] The general rules

[1] See Western Ins. Co. v. Cropper, 32 Pa. St. 351; s. c., 75 Am. Dec. 561; Teutonia Ins. Co. v. Mund, 102 Pa. St. 94; McClure v. Watertown Ins. Co., 90 Pa. St. 289; Grant v. Lexington Ins. Co., 5 Ind. 23; s. c., 61 Am. Dec. 74; Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92; Haws v. Fire Assn., 7 Atl. Rep. 159; Dennison v. Phœnix Ins. Co., 52 Iowa, 457; Holbrook v. Ins. Co., 25 Minn. 229; Wheeler v. Traders' Ins. Co. (N. H.), 1 N. Eng. Rep. 332; Piedmont, etc. Ins. Co. v. Young, 58 Ala. 476; Atlantic Ins. Co. v. Manning, 3 Colo. 224; Schroeder v. Trade Ins. Co., 109 Ill. 157; N. W. Mut. Life Ins. Co. v. Hazlett, 105 Ind. 212; Stout v. Com. Union Assurance Co., 12 Fed. Rep. 554; Allen v. St. Louis Ins. Co., 85 N. Y. 473.

[2] Wood on Fire Ins. 141. See also May on Ins. § 175, and authorities cited in note 1, *supra;* also Georgia, etc. Ins. Co. v. Kinnier, 5 Cent. L. J. 127, and note, 133.

[3] Foot v. Ætna Life Ins. Co., 61 N. Y. 571. See also note to Georgia Ins. Co. v. Kinnier, 5 Cent. L. J. 133.

[4] Goodrich v. Treat, 6 Colo. 408; Savage v. Howard Ins. Co., 52 N. Y. 504; Crane v. Howard Ins. Co., 3 Fed. Rep. 558.

[5] 1 Wood on Fire Ins. 141, 144; People's Ins. Co. v. Kuhn, 1 Cent. L. J. 214; Hermann v. Merchants' Ins. Co., 81 N. Y. 184.

[6] Manger v. Holyoke Fire Ins. Co., 1 Holmes, 287;

governing this subject are liberal and just, and their application to the principal case fully justifies the conclusion reached by the court, notwithstanding the fact that the language of the policy is so ambiguous as in itself, perhaps, to admit of a narrower and more technical construction.

In the following cases the doubtful clauses in the policies were construed in favor of the insured and the companies were held liable, as in the principal case. Thus, a policy insuring a number of horses "all contained in" the "new two-story frame barn" of the assured, was held to cover a brood mare of the assured which had been in the barn, but was struck by lightning while pasturing in a field.[7] The court pursue substantially the same course of reasoning as that of Judge Mitchell in the principal case. In the course of his opinion Judge Paxson draws a clear distinction between fire insurance on goods or merchandise contained in a particular building and lightning insurance on horses and cattle. "We can understand," he says, "that if, in a fire policy, hay, straw, or grain is insured in a barn, the insurance would cease if (the property were) removed to some other building. Such would be the reasonable meaning of the contract of insurance, and what the parties contemplated when they made it. But none of this reasoning applies to a lightning clause upon horses or other stock. The terms and conditions to which an insurance is subject must be such as are reasonably applicable to such kind of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made." In another recent case the policy insured the plaintiff against loss by fire "on his horses and colts while in barn and by lightning while in use, or running in pasture, or yard on his farm, in the town of Le Seur," and it was held that the risk against lightning was not limited to the horses while in use or pasturing on the farm owned by the plaintiff at the date of the policy, but extended to another farm in the same town.[8] Patterns for iron castings are "tools" covered by a policy insuring "fixed and movable machinery, engine, lathes and tools" of a manufacturer of machinery; and are not within an exception of "jewels, plate, watches, ornaments, medals, patterns, printed music," etc.[9] And in many cases the words "contained in," or the like, have been held to be merely descriptive and not restrictive.[10]

On the other hand, it has been held that a policy of insurance on an "oil mill and mill-wright's gear therein" does not include machinery in a separate detached building although worked by the same power and considered as part of the mill.[11] Nor does a policy on "household furniture, linen, and wearing apparel," include linen drapery bought on speculation.[12] And where the insurance was on "two M & A passenger cars contained in engine house No. 1, and engine J H N, contained in engine house No. 2," it was held not to cover such cars and engine while making a regular trip on the line of the railway, the words "contained in" being held to be restrictive.[13] But this decision seems questionable.[14] And a policy on "the stock, lumber, and goods manufactured, and in process of manufacture in said building," will not cover lumber and stock piled in the adjoining yard.[15]

Unless there is a "lightning clause" in the policy it seems that the mark of fire must appear on the insured property whether it be live stock[16] or a dwelling house.[17]

Goodrich v. Treat, 6 Colo. 408; Bowman v. Pacific Ins. Co., 27 Mo. 15; Lord Hale's opinion in Crossing v. Scudamore, 2 Lev. 9; Brink v. Merchants' Ins, Co., 49 Vt. 442; Philip's Ins. § 124.

7 Haws v. Fire Assn. (Penn.), 7 Atl. Rep. 159. This case was followed by the same court in Am. Cent. Ins. Co. v. Haws, 11 Atl. Rep. 107.

8 Boright v. Ins. Co., 34 Minn. 352; s. c., 25 N. W. Rep. 796.

9 Lovewell v. Westchester Fire Ins. Co., 124 Mass. 418; s. c., 26 Am. Rep. 671. See also Moodinger v. Mechanic's Fire Ins. Co., 2 Hall (N. Y. Sup. Ct. Rep.), 490.

10 See Davison v. Washington Fire Ins. Co., 30 Md. 91; Stokes v. Cox, 38 Eng. L. & Eq. Rep. 436; Dole v. Marine Ins. Co., 6 Allen, 385; Roth v. City Ins. Co., 6 McLean, 324. This depends, however, largely on the nature of the property and the circumstances of each particular case.

11 Hare v. Barstow, 8 Jur. 928.

12 Watchorn v. Langford, 3 Campb. 422.

13 Annapolis, etc. R. Co. v. Prest. of Balt. Fire Ins. Co., 32 Md. 37; s. c., 3 Am. Rep. 112.

14 See, however, Boynton v. Clinton, etc. Ins. Co., 16 Barb. 258; Lewis v. Springfield Ins. Co., 10 Gray, 129; Lycoming Co. Ins. Co. v. Updegraff, 40 Pa. St. 322, cited in support of that decision.

15 North Am. Ins. Co. v. Throop, 22 Mich. 146; s. c., 7 Am. Rep. 638.

16 Beaumont on Ins. 37.

17 Babcock v. Montgomery Mut. Ins. Co., 6 Barb. 637; Kenniston v. Mer. Co. Mut. Ins. Co., 14 N. H. 241; Angell on Ins. § 113; 3 Addison on Cont. § 1210. But see, as to explosions from gunpowder, Scripture v. Lowell Ins. Co., 10 Cush. 356; Grim v. Phœnix Ins. Co., 13 Johns. 451; Waters v. Merchants' Ins. Co., 11 Pet. 213.

FRAUDULENT CONVEYANCE — EVIDENCE — DECLARATIONS.

ROGERS V. THURSTON.

Supreme Court of Nebraska, July 3, 1888.

1. *Fraudulent Conveyance—Evidence—Declaration after Sale.*—Declarations made by a vendor wholly separate and apart from the sale of goods made to a creditor in payment of a debt, are not competent evidence.

2. *Same—Exception to General Rule.*—If a combination between vendor and vendee to defraud other creditors is first shown, or if the declarations are connected with the transaction in such a way as to be part of the *res gestæ*, such statements are admissible.

3. *Same—Declarations as to Value before Sale.*—Declarations made to a creditor two weeks before the sale, as to the value of a stock of goods, and of which a subsequent purchaser had no notice, are not admissible to show fraud.

MAXWELL, J., delivered the opinion of the court:

In February, 1883, one T. M. Ellis was engaged in the hardware business at Ord, in Valley county. At that time he was indebted to Milton Rogers & Son in the sum of $960, and to Lee, Fried & Co. in an amount somewhat exceeding $1,300. At that time the attorney of the creditors called upon Mr. Ellis for payment of said claims; and, he being unable to pay, said attorney purchased the stock of goods from Ellis for said creditors, and took possession of the store, excluding Ellis

therefrom. A few days afterwards one Fred L. Harris caused an execution to be levied on the goods on a judgment in his favor against Ellis. Milton Rogers & Son and Lee, Fried & Co. thereupon brought an action of replevin, and regained the possession of the goods. On the trial of the cause, the jury returned a verdict in favor of Harris for the sum of $450, upon which judgment was rendered. A large number of errors are assigned in the record, but two of which it will be necessary to notice.

Mr. Harris was called as a witness in his own behalf, and testified as follows: "Question. You are acquainted with one Lew Ellis, that was engaged in business here in the year 1883? Answer. Yes, sir. Q. State if you saw him shortly after returning from Omaha, in the early part of '83. A. Yes, sir. Q. When was that? A. That was about the 21st or 22d day of February, 1883. Q. State if you had any conversation with Mr. Ellis. A. I had a conversation with Mr. Ellis. Q. You may state whether or not it was respecting the goods in controversy. You may state what that conversation was. Go ahead, and state the conversation as it occurred, specifying the time it occurred, respecting the sale here in question. A. I had a conversation after I came back from Omaha with Mr. Ellis. It was about the 21st or 22d of February, 1883. I was in the bank. I had been away. I came home; went into the bank; was around transacting some business. Mr. Ellis came in. He came around behind the railing of the bank. I says: 'You have been doing some business since I have been gone?' He says, 'Yes.' I says: 'What did you do it for?' He says: 'I didn't understand what I was doing at the time I did do it.' Q. What does it refer to? A. The sale of this property. Q. The sale of this property to whom? A. To Lee, Fried & Co. and Milton Rogers & Son. I asked him why he did it. He says: 'I did not understand really what I was doing.' He says they came up there. He says: 'They rushed in on me, and said I was busted, and wasn't worth anything, and that they had to do something.' He said: 'They fetched out some papers. I really didn't understand what they was.' I says: 'What did you sign them for? Didn't you know it was taking my rights away from me?' He says: 'No; I didn't so understand it.' He says: 'I asked them particularly about you.' I asked him why he did it. He says: 'I understood that I was to stay in there.' Q. State the balance of the conversation. A. He says: 'They told me that I was to stay in there, and sell the goods, and pay your debts.' He says: 'That was the only reason I sold out for.' He says: 'They represented to me that I was to stay in that house, and sell those goods and pay you. That's me,' he says. 'That is the only reason I made this transaction—signed those papers.' Ellis told me distinctly that he asked them about me, and that they told him that my claim was to be paid in full; that he was to stay in there, sell the goods, and pay me out of the proceeds. I asked him: 'What did you go away so quick for? Seems to me you are hurrying away pretty fast.' He said: 'I supposed I was to stay in there, and sell those goods and pay you. Q. Mr. Ellis said he was to stay in there, and sell those goods? A. Mr. Ellis, after this conversation, says that he went back there to take possession of this stock. Q. What, if anything, occurred after the papers were signed? A. He started to get possession of the stock, and he was told by Lee— Q. Was you present when he was told? A. That is what Ellis told me. He told me he was starting back to take possession of the stock. He said they told him he wasn't needed there any more. Q. Whom did he refer to by the word 'they?' A. Lee, Fried & Co. Q. What did they say? A. They said he wasn't needed around there. He said his signs were torn down, and he had no other place to go. He said he thought that— Q. Never mind that. What was said, if anything, respecting employment by Lee, Fried & Co.? A. He said Lee, Fried & Co. offered him a job. His store was taken away, signs torn down, and he might as well go back. Q. Do you know where this man Ellis is now? A. I do not. Q. Do you know where he has been at any time since this, and in whose employment he has been since this sale? A. He wrote me about—" In his cross-examination and redirect examination, Mr. Harris states more definitely what was stated by Mr. Ellis in relation to the sale of the goods. There is a very large amount of testimony of different witnesses detailing the admissions of Ellis after he had sold the goods to the plaintiffs. All such testimony was objected to by the plaintiffs, and admitted over their objection, exceptions being duly taken. There is no charge of conspiracy between the plaintiffs and Ellis to defraud the other creditors of Ellis; and, even if there were, the common design must be first shown before the statements or declarations made by one of them in the absence of the others can be given in evidence against the others. People v. Parish, 4 Denio, 153; Williamson v. Com., 4 Grat. 547; State v. Simons, 4 Strob. 266; Reg v. Mears, 1 Eng. Law & Eq. 581; State v. Ripley, 31 Me. 386; Glory v. State, 13 Ark. 236. But there was no attempt to prove conspiracy.

2. We know of no rule that would justify the proof of the admissions of Ellis against the plaintiffs, made after he had parted with his title to the goods to the plaintiffs. Evidence of oral admissions in any case is to be received with great caution. While the statements of a person prejudicial to his own interest are admissible in evidence against him, yet the repetition of oral statements is always subject to great imperfection. The party making the admission may not have correctly expressed his meaning, or he may have spoken jestingly, or without due consideration; and, even if his meaning was correctly expressed, he may have been misunderstood, or a slight alteration of the words, without any design to misrepresent, may entirely vary the effect of the

statement. Hence, while courts, holding that such evidence is admissible in a proper case, receive it with great caution. 1 Phil. Eq. (4th ed.) 479, and notes. Judge Redfield, in the twelfth edition of Greenleaf on Evidence (volume 1, § 200), in speaking of proof of oral admissions, says: "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the parties, and especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and in instances it will appear that the witness deposes to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favor as the fullest admission of the utter falsity of his claim. When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony. The fact, too, that, in the final trial of open questions of fact, both sides are largely supported by evidence of this character, in the majority of instances, must lead all cautious triers of fact greatly to distrust its reliability." But in no case can admissions made by a vendor after he has parted with his title, and not connected with the transaction, be admissible against his vendee. This precise question was before this court in Simpson v. Armstrong, 20 Neb. 513, 30 N. W. Rep. 941, where it is said: "The only theory upon which testimony of this kind is admissible is that it becomes a part of the *res gestæ*, being so nearly connected therewith as to be spontaneous and unpremeditated, and therefore free from sinister motives; thus giving a reliable explanation of the principal transaction—the subject of the inquiry." This testimony, therefore, was not admissible, and is clearly shown to have been prejudicial to the plaintiffs.

3. Mr. Harris was permitted to testify that Ellis made an inventory of his stock about ten days or two weeks before the sale to the plaintiff, and that he had informed the witness that the sum total of his (Ellis') assets was about $3,000 or $3,100. This testimony is introduced for the purpose of proving the value of the property which the plaintiff received from Ellis, and was clearly prejudicial. There are other errors alleged; but as there must be a new trial, and it is probable the errors complained of will be avoided, they need not be further considered. The judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

NOTE.—When can the admissions of a judgment debtor be introduced in evidence to show that a contract entered into by him with certain creditors is fraudulent as against other creditors? Admissions made by the vendor after surrendering possession, to be competent evidence against the vendee must be made either in the presence of the vendee, or while the vendor retains possession after sale, or the declaration must form part of a conspiracy to defraud and so become a part of the *res gestæ*, or the grantee must have notice of the defect when he purchased.[1] But the admissions of the party made after the contract is executed and the possession of the property to which it relates is surrendered, cannot be introduced by a judgment creditor as evidence to prove fraud and set aside the conveyance and assignment;[2] the admissions of the person might be good evidence against himself as to any interest he might have in the contract,[3] but to offer to establish fraud in the other party to the contract by such evidence would be an attempt to prove the *gravamen* of the case by mere hearsay.[4]

In the case of realty, many cases cited by law writers relate to the title passed to the grantee, when it is contested on other grounds than fraud and where the party can be invested with no better title than that of the former owner,[5] as ancestor and heir, donor and donee.[6]

General Principles.—Record title cannot be impeached by declarations of grantor, and it does not matter when they were made. This principle refers purly to the title and not to the transaction of passing title.[7] Title to chattels and choses in action cannot be disputed by declarations made before or after the sale. The vendee must be connected with the evidence in some way.[8]

The following exceptions are applicable where the transfer is tainted with fraud. 1. Admissions made by the vendor in the presence of the vendee will be binding against the latter, unless he contradicts the statements. But in order that his silence should be construed against him, it must appear that the circumstances afforded him the opportunity to speak and that the language used was understood and called for

[1] 1 Greenleaf on Ev., chapter on admissions; 2 Wharton on Ev., chapter on admissions.

[2] Winchester & Co. v. Creary, 116 U. S. 161; Steinbach v. Stewart, 11 Wall. 566; United States v. Wood, 14 Pet. 430; Adler v. Apt, 14 N. W. Rep 63; Lee v. Brown, 21 Kan. 458; Jackson v. Kniffen, 2 Johns. 31; Finch v. Phillips, 41 Wis. 387; 1 Greenleaf on Ev. § 187; Dozey v. Mills, 5 Gilm. (Ill.) 67; Meyers v. Kinzie, 26 Ill. 36; Clements v. Moore, 6 Wall. 299; Hayden v. Stone, 121 Mass. 413; Jacobs v. Remsen, 36 N. Y. 670; Taylor v. Marshall, 14 Johns. 204; McLaughlin v. McLaughlin, 91 Pa. St. 462; Daniels v. McGinnis, 97 Ind. 549; Bunkers v. Green, 48 Ill. 243; Shirland v. Iron Works, 41 Wis. 162; Burt v. McKinstry, 4 Minn. 204; Porter v. Allen, 54 Ga. 623; Weinrich v. Porter, 47 Mo. 293; Sumner v. Cook, 12 Kan. 162; Thompson v. Herring, 27 Tex. 282; Bixby v. Carskadden, 63 Iowa, 164.

[3] 1 Greenleaf on Ev. § 169; Hyde v. Stone, 20 How. 170; Smith v. Kennedy, 1 Wash. Ter. 66; Venable v. Bank of United States, 2 Pet. 107; Reed v. Noxon, 48 Ill. 323; Gamble v. Johnson, 9 Mo. 597.

[4] Gaines v. Relf, 12 How. 472; Hopt v. Utah, 110 U. S. 574; Prior v. White, 12 Ill. 262.

[5] 1 Greenleaf on Ev. § 169, and citations.

[6] 1 Greenleaf on Ev. § 189.

[7] Gibney v. Marchay, 34 N. Y. 304; Mastin v. Thomas, 8 Gill (Md.), 19-29; Jackson v. Cole, 4 Cow. 589; Norton v. Pettibone, 7 Conn. 319.

[8] Beach v. Wise, 1 Hill, 612; Dodge v. Freedman's Sav. Bank, 93 U. S. 379; Abbott's Trial Ev. 740.

explanation, if he did not wish to be considered as assenting to the statements.[9] 2. Admissions while he retains possession of personal property or choses in action, after an assignment of title has been made, are competent evidence. Possession under such circumstances is a presumption, and in some States a conclusive proof of fraud on the part of both vendor and vendee.[10] Where the retention is authorized by the instrument and is consistent with its general nature and object, possession has been held valid.[11] Declarations of the grantor of land made after the deed is executed but while he is occupying the premises, are competent to show in what character he holds them.[12]

"It has long been settled," says Justice Hunt, in Dodge v The Freedmans Sav. & Trust Co.,[13] "that the declarations made by the holder of a chattel or promissory note while he held it, are not competent evidence in a suit upon it or in relation to it, by a subsequent owner. This was settled in the State of New York, in the case of Paige v Cagwin,[14] and is now admitted to be sound doctrine and that the party is since deceased makes no difference,[15] or that the transfer is made after maturity.[16] The same is true of the declarations of a mortgagee,[17] or of the assignor of a judgment,[18] or of an indorser,[19] or of a judgment debtor.[20] The declarations of a party in possession of land are competent evidence as against those claiming the land under him," as landlord and tenant, ancestor and heir.[21] "Such declarations are competent only to show the character of the possession of the person making them and by what title he holds, but not to sustain or destroy the record title."[22]

3. If it is shown that the grantor and grantee of property, real or personal, were engaged in a common purpose to defraud the creditors of the former, any declarations of either, made in furtherance of the scheme or forming part of the *res gestæ*, will be admissible.[23] But declarations of the vendor after the sale are not competent as proof of a conspiracy to defraud creditors, unless the alleged common purpose to defraud is first established by independent evidence, and unless such declarations have such relation to its execution as to constitute a part of the *res gestæ*.[24]

Authorities seem to establish the rule that declarations to impeach the title of the vendee or grantee on the ground of fraud, must be made during the transaction or be made in furtherance of a conspiracy to defraud the creditors of the grantor or vendor. Where the owner makes a sale in compliance with all the legal formalities, in the case of realty if the sale is presuptively fraudulent, in case of personalty if possession is retained, statements made under such circumstances are admissible, as they come within the rule as being part of the *res gestæ*,[25] or the grantor must acquire title with actual notice of the declarations.[26]

Res Gestæ.—In determining what declarations form part of *res gestæ* the general rule is, that all declarations made at the same time the main fact under consideration takes place and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed as part of the *res gestæ*.[27]

9 1 Greenleaf on Ev. 197; Turner v. Yates, 16 How. 27; Wheeler v. McCorrister, 24 Ill. 40; Lark v. Linstead, 2 Md. Ch. 162; Meyers v. Kinzie, 26 Ill. 36; Wiley v. Manley, 51 Ind. 169; Wilson v. Woodruff, 50 Mo. 40; Block v. Hicks, 27 Ga. 522.

10 Randegger v. Ehrhardt, 51 Ill. 101; Gill v. Crosby, 63 Ill. 190; Thornton v. Davenport, 1 Scam. 296; Dawes v. Cope, 4 Binn. 258; Hall v. Parsons, 15 Vt. 271; Boyden v. Moore, 11 Pick. 362; Ingraham v. Wheeler, 6 Conn. 279; Caldwell v. Rose, 1 Smith, 190; Field v. Simco, 7 Ark. 289; Catlin v. Carrier, 1 Sawyer, 7; Robinson v. Elliott, 22 Wall. 513; Place v. Langworthy, 13 Wis. 629; Lang v. Lee, 3 Rand, 410; Collins v. Meyers, 16 Ohio, 547; Smith v. Acker, 23 Wend. 653; Lodge v. Samuels, 50 Mo. 266; Lienau v. Moran, 5 Minn. 482; Torbert v. Hayden, 11 Iowa, 435; Pyle v. Warren, 2 Neb. 241.

11 Meeker v. Wilson, 1 Gall. 423; Bartlett v. Williams, 1 Pick. 295; Brooks v. Marbury, 11 Wheat. 88; Clow v. Woods, 5 S. & R. 278; Rand v. Jeffries, 5 Rand. 252; Anderson v. Fuller, 1 McMul. Eq. 27.

12 2 Wharton on Ev. § 1165, and citations; Hilliard v. Phillips, 81 N. C. 99; Kirby v. Masten, 70 N. C. 540; Pier v. Duff, 63 Pa. St. 63.

13 3 Otto, 379-387.

14 7 Hill, 361.

15 Beach v. Wise, 1 Hill, 612.

16 Paige v. Cagwin, *supra*.

17 Earl v. Clute, 2 Abb. Ct. App., Dec. 1.

18 Tousley v. Berry, 16 N. Y. 497.

19 Ireland v. Kip, Anth. N. P. 142.

20 Legg v. Olney, 1 Den. 202.

21 Warring v. Warren, 1 Johns. 340; Jackson v. McCall, 10 Johns. 377.

22 Pitts v. Wilder, 1 N. Y. 525; Gibney v. Marchay, 34 N. Y. 301; Jackson v. Miller, 6 Cow. 951; Jackson v. McVey, 15 Johns. 234.

23 Jones v. Simpson, 116 U. S. 609; Cuyler v. McCartney, 40 N. Y. 221; Apthorp v. Comstock, 2 Paige, 482; 1 Greenleaf on Ev. § 111; Sundry Goods v. United States, 2 Pet. 358; Spies v. People, 10 West. Rep. 701.

24 Winchester & Co. v. Creary, 116 U. S. 161; 1 Greenleaf on Ev. § 110; Adler v. Apt, 14 N. W. Rep. 63; Lee v. Brown, 21 Kan. 458; Clinton v. Estes, 20 Ark. 216; Patton State, 6 Ohio St. 467.

25 Abbott's Trial Ev., p. 190, § 9; 1 Greenleaf on Ev. (12th ed.) § 187; Brandt on Suretyship and Guaranty, § 518; Stetson v. Bank of New Orleans, 2 Ohio St. 167; Lee v. Brown, 21 Kan. 458; Snell v. McGavock, 1 Swan, 208; American Fur Co. v. United States, 2 Pet. 358; Preston v. Bowers, 13 Ohio St. 1-13; Apthorp v. Comstock, 2 Paige, 482-488.

26 1 Greenleaf on Ev. § 190.

27 Stirling v. Buckingham, 46 Conn. 461; Enos v. Tuttle, 2 Conn. 247; leading article and citations, 16 Cent. L. J. 2, 3, 4, 5; Lord Cockburn, in 19 Cent. L. J. 198; leading articles, 8 Cent. L. J. 162, 222, 310; Dunbar v. McGill, 37 N. W. Rep. 285.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. AGENCY—Interest—Revocation. —— An agent who is paid by commissions on sums of money loaned, to be retained by him, has no such interest in his agency as will prevent revocation by the principal. — *Bank v. Mortgage Co.*, U. S. C. C. (Oreg.), May 7, 1888; 35 Fed. Rep. 22.

2. AGENCY — Revocation — Power. —— An agency coupled with an interest, may be revoked, if so agreed. — *Bank v. Mortgage Co.*, U. S. C. C. (Oreg.), May 7, 1888; 35 Fed. Rep. 22.

3. APPEAL—Erreneous Entry. —— A clerical error in the entry of a judgment will not be noticed on appeal, unless called to the attention of the trial court. — *Dickinson v. Gray*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 877.

4. APPEAL—Exceptions.—— An appeal not perfected by bill of exceptions, assigning errors, will be dismissed. — *Snowden v. State*, Md. Ct. App., June 13, 1888; 14 Atl. Rep. 531.

5. APPEAL—Forcible Entry and Detainer. —— An appeal from the circuit court of an action of forcible entry and detainer not involving title to land should go to the court of appeals and not to the supreme court.— *Ford v. Fellows*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 791.

6. APPEAL—New Trial— Evidence. —— The evidence being conflicting in a case to set aside as fraudulent the lien of a confessed judgment and execution, under the California insolvent act, the order granting a new trial will not be disturbed on appeal. — *Benheim v. Christal*, S. C. Cal., June 15, 1888; 13 Pac. Rep. 683.

7. APPEAL—Review—Record. —— An indorsement of "agreed to" on a judgment does not show that it was rendered by consent, when the judgment recites a hearing and the alleged stipulation of consent is not made a part of the bill of exceptions. — *San Francisco S. U. v. Myers*, S. C. Cal., June 20, 1888; 18 Pac. Rep. 686.

8. ARBITRATION—Submission—Revocation.——A submission to arbitration, if not made a rule of court, may be revoked by either party before the award is made. In such case an action by the party injured is on the agreement to submit. — *Bank v. Mortgage Co.*, U. S. C. C. (Oreg.), May 7, 1888; 35 Fed. Rep. 22.

9. ASSAULT AND BATTERY — Parties. —— A female acting with a male can be guilty of aggravated assault, as all present acting are principals. — *Kemp v. State*, Tex. Ct. App., June 16, 1888; 8 S. W. Rep. 804.

10. ASSIGNMENT—Creditors—Sale.—— A purchaser in good faith is entitled to have the sale upheld against a subsequent assignment for the benefit of creditors. — *Vincent v. Alpin*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 872.

11. ASSIGNMENT FOR CREDITORS — Requirements.—— An instrument purporting on its face to be a general assignment, and to convey all the debtor's property for the benefit of creditors, is a general assignment, and must conform to the requirements of the Tennessee act, and must contain a full and complete inventory of all the debtor's property. — *Scheibler v. Mundinger*, S. C. Tenn., May 28, 1888; 9 S. W. Rep. 33.

12. ASSUMPSIT — Instruction — Quantum Meruit. —— Where a plaintiff brought an action of *assumpsit* with the common counts for work and labor, under a contract and money expended, an instruction that the plaintiff could not recover if the jury found that he had entered into a new contract was properly refused, there being evidence tending to show that he could recover upon a *quantum meruit*. — *Public, etc. Co. v. Patrick*, Md. Ct. App., June 13, 1888; 14 Atl. Rep. 522.

13. ASSIGNMENT—Pretended Sale.——Receiving lumber from a failing debtor in excess of the sum necessary to enable the debtor to carry out a contract for it, renders the party recovering liable to account to creditors for the sum paid on an old account by the debtor.— *Vincent v. McAlpin*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 873.

14. ATTACHMENT—Justice's Court — Appeal. —— Under California law, an attachment of defendant's property in a justice's court is dissolved upon judgment in his favor, though plaintiff appeals.— *Loveland v. Alvord C. Q. M. Co.*, S. C. Cal., June 16, 1888; 18 Pac. Rep. 682.

15. ATTACHMENT—Purchase Price — Partnership. —— Under Missouri law, property inventoried as partnership assets, in the possession of the administrator of a deceased member of a firm, may be reached by an execution issued on a judgment against the surviving partners for the purchase price. — *State v. Mason*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 19.

16. BANKING—Cashier— Defalcation. —— Directors of a bank are not liable for the frauds of a cashier concealed by false entries, requiring a skilled accountant to find out.—*Bank v. Caperton*, Ky. Ct. App., June 2, 1888; 8 S. W. Rep. 885.

17. BANKING—Directors—Liability.—— Directors of a bank who serve gratuitously are not held to that degree of care and diligence as they otherwise would be.—*Bank v. Caperton*, Ky. Ct. App., June 2, 1888; 8 S. W. Rep. 885.

18. BANKRUPTCY — Jurisdiction — Discharge — State Courts. —— Construction of bankrupt laws. When a discharge in bankruptcy may be pleaded in a State court in bar of a judgment rendered after the bankruptcy proceedings had been begun.— *Williams v. Humphreys*, S. C. N. J. June 11, 1888; 14 Atl. Rep. 553.

19. BILLS AND NOTES—Deposit—Assignment. ——The assignee under a general assignment takes money in bank as against the owner of a draft drawn thereon which was not presented till after the assignment and the receipt of the funds by the assignee.— *Ray v. Hiller*, S. C. Colo., June 15, 1888; 18 Pac. Rep. 622.

20. BOND—Action. —— Where a bond has been given and appropriate action has been taken upon it in a legal proceeding, it is too late for the surety upon it to object that he signed it in blank, thinking it to be a bond of a different nature from that in which it was filled up and used.— *Willis v. Rivers*, S. C. Ga., April 11, 1888; 7 S. E. Rep. 90.

21. BRIBERY—Statute—Verdict.——Where the statute requires the jury to specifically fix the penalty for selling a vote at an election, it is error for the court to fix the same. — *Eldridge v. Commonwealth*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 892.

22. BURGLARY—Evidence—Instruction.—— A defendant, found in possession of some of the stolen property, on the trial introduced evidence to prove an *alibi*. An instruction that where stolen property is found, if the possessor fails to account for its possession in a manner consistent with his innocence he is presumed to be a thief, is erroneous, as it excludes the question of *alibi* from the consideration of the jury.— *State v. North*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 799.

23. CHARITABLE USES—Trust—Trustee. —— Where a testator left money to a trustee with directions that it should be applied to charitable uses, and the trustee died after having disposed of but a small part of the fund: *Held*, that the fund should be applied to charitable uses, under the direction of the court. — *Minot v. Baker*, S. J. C. Mass., July 10, 1888; 17 N. E. Rep. 839.

24. CHATTEL MORTGAGE — Corporate Stock. —— A mortgage of shares of corporate stock is valid between the parties, though the stock is not delivered and land is included therein. — *Tregear v. Etiwanda W. Co.*, S. C. Cal., June 11, 1888; 18 Pac. Rep. 656.

25. CHATTEL MORTGAGE— Future Advances—Sales.—— A chattel mortgage may be made to secure future ad-

vances, but a sale of the property and purchase thereof by the mortgagee when there have been no advances, do not divest the title of the mortgagor.—*Coffin v. Taylor*, S. C. Oreg., June 7, 1888; 18 Pac. Rep. 638.

26. CHATTEL MORTGAGE—Renewing Stock. ——Goods used in replenishing a mortgaged stock go the creditors of the mortgagor upon a nassignment.—*Rosenburg v. Thompson*, Ky. Ct. App., May 5, 1888; 8 S. W. Rep. 895.

27. CLERK—Probate Court—Statute.——Construction of Illinois statute rela ive to the accounting and payment of money by the clerk of the probate court of Cook county. An order varying from that statute is void.—*County of Cook v. Sennott*, S. C. Ill., June 16, 1888: 17 N. E. Rep. 791.

28. CONSTITUTIONAL LAW — Railroad — County and Voters. —— Under Mo. Const. 1865, and G. S. 1865, § 17, authorizing counties to subscribe for railroad stock upon two-thirds of the qualified voters of the county voting therefor, two-thirds of the registered voters is meant, and not two-thirds of the number actually voting, and where two-thirds of the registered voters do not vote in favor of the subscription, the order of the county court for the stock is without authority. — *State ex rel. etc. v. Harris*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 794.

29. CONSTITUTIONAL LAW—Titles of Law.——The provision that the object of a law shall be expressed in its title, operates to give to the title the force of law, and it is also a limitation upon the power of the legislature who can enact nothing in addition to, or contravention of, the object expressed in the title. — *State v. Township, etc.*, S. C. N. J., June 19, 1888; 14 Atl. Rep. 587.

30. CONTEMPT—Procedure — Time. —— A judgment and order for a commitment for a contempt committed in the presence of the court, not entered until fifty days thereafter, and without notice, or any serious action in the matter, is void.— *In re Foote*, S. C. Cal., June 12, 1888; 18 Pac. Rep. 678.

31. CONTINUANCE—Absent Witness.—— Circumstances stated under which it was held that a continuance was properly refused, when asked on account of the absence of a witness whose evidence appeared by the application for the continuance, to be immaterial.—*Smokey v. Johnson*, S. C. Miss., March 19, 1888; 4 South. Rep. 787.

32. CONTRACT—Interpretation—Materials. —— A subcontractor on railroad construction on rescission of contract is not limited to materials inspected and received, when he was entitled to be compensated for materials furnished. — *Dickinson v. Gray*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 876.

33. CONTRACTS—Rescission — Subcontracts.——A subcontractor on railroad construction having acquiesced in a rescission of his contract cannot claim prospective profits which would have resulted had the work been completed. — *Dickinson v. Gray*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 876.

34. CONTRACT—Restraint of Trade—Limitation. ——A contract not to engage in the practice of medicine within a certain district is not void as in restraint of trade, merely because the restriction is not limited in point of time.—*French v. Parker*, S. C. R. I., May 17, 1888; 14 Atl. Rep. 870.

35. CORPORATION — Stock — Transfer. —— To render the assignee of stock liable to calls for assessments paid by an original holder, the proof or acceptance of the stock by the transferee should be clear; the record of the transfer on the books of the company is insufficient.—*Tripp v. Appleman*, U. S. C. C. (Ohio), May 9, 1888; 35 Fed. Rep. 19.

36. COVENANT—Vendor and Vendee — Warranty. —— Where one agreed to convey certain lands "with undoubted title clear of all tax, etc., and incumbrance to the best of my knowledge and belief," *Held*, that these last words to the "best of my knowledge and belief" apply to the whole phrase and not to the word incumbrance only. — *Barton v. Song*, N. J. Ct. Chan., June 30, 1888; 14 Atl. Rep. 568.

37. CREDITOR'S BILL—Priority—Lien — Federal Court. ——Where a judgment creditor files a bill to set aside a fraudulent conveyance by the debtor to a non-resident and service is obtained in the federal court upon the debtor, but not upon the non-resident grantee, such judgment must be postponed to the judgment of a creditor, who, in a State court, obtains personal service on the debtor and service by publication on the non-resident grantee. — *Hallorn v. Trum*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 823.

38. CRIMINAL LAW — Appeal Bond. —— An appeal bond in a criminal case, which does not cover subsequently accruing costs, is good if approved. — *Down v. State*, Tex. Ct. App., June 16, 1888; 8 S. W. Rep. 819.

39. CRIMINAL LAW—Appeal — Jurisdiction. —— The supreme court cannot in a criminal case set aside the verdict on appeal on the facts when the evidence is conflicting.—*People v. Bowers*, S. C. Cal., June 14, 1888; 18 Pac. Rep. 660.

40. CRIMINAL LAW—Copy of Indictment.——It is error to refuse a demand for a copy of the indictment, even though the accused be in custody. — *Woodall v. State*, Tex. Ct. App., June 13, 1888; 8 S. W. Rep. 802.

—41. CRIMINAL LAW—Cumulative Sentences. ——Cumulative sentences for different offenses, that inflict punishment on one indictment after the expiration of the term of another are not irregular under R. S. Mo. § 1659. —*Ex parte Jackson*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 800.

42. CRIMINAL LAW — Evidence. —— If improper evidence be admitted and withdrawn before the close of the prosecutor's case, it will not affect the matter if the jury are told to disregard it. — *Pearce v. Commonwealth*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 893.

43. CRIMINAL LAW—Evidence.——Evidence that one's veracity is good is not admissible when there is merely a conflict of testimony. — *Rushing v. State*, Tex. Ct. App., June 13, 1888; 8 S. W. Rep. 807.

44. CRIMINAL LAW—Evidence— Accomplice.——Parties against whom is shown strong criminative facts, and who are jointly indicted with defendant, who is tried separately on a charge for conspiracy and murder, are incompetent witnesses for the defense.— *Pearce v. Commonwealth*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep 893.

45. CRIMINAL LAW—Homicide— Insanity. ——Upon a trial for murder, where the defence is insanity, an instruction is proper that, to excuse defendant, the defendant should have been from such insanity unable to distinguish, in respect of the crime charged, between right and wrong, or that, if conscious of the act and its consequences, he must have been by reason of insanity wrought up to a fury rendering him incapable of controlling his actions, and that, if reason was dethroned temporarily merely by passion or revenge, defendant could not thereby be shielded from the consequences of his actions.— *Williams v. State*, S. C. Ark., June 15, 1888; 9 S. W. Rep. 5.

46. CRIMINAL LAW—Homicide—Malice. —— On a trial for murder, testimony as to a quarrel between deceased and defendant several years prior, and threats then made by defendant, is admissible to show malice. — *People v. Brown*, S. C. Cal., June 15, 1888; 18 Pac. Rep. 678.

47. CRIMINAL LAW—Indictment—Gambling. —— Showing what certainty is required in a complaint for visiting gambling houses contrary to city ordinance. — *In re Lane*, S. C. Cal., June 16, 1888; 18 Pac. Rep. 677.

48. CRIMINAL LAW—Information— Arrest. —— An information charging a criminal offense must be made under oath. An information charging that defendant being a clerk made false and fraudulent entries on the books of his employer to his great loss and injury, sufficiently states an offense and authorizes an arrest. — *McConnell v. Kennedy*, S. C. S. Car., July 13, 1888; 7 S. E. Rep. 76.

49. CRIMINAL LAW—Murder—Insanity. ——To make a killing murder in the first degree the prisoner must be shown to be capable of knowing at the time of the act its nature and probable consequence, and that he had power over his will to have prevented him from com-

mitting the crime.—*State v. Reidell*, Del. Ct. Oyer and T., May 18, 1888; 14 Atl. Rep. 550.

50. CRIMINAL LAW—Reversal—Effect.—— A defendant sentenced at the same term of court to three successive terms of imprisonment, the reversal of the second term of imprisonment does not release him from serving the third, which begins immediately on the expiration of the first. — *Ex parte Jackson*, S. S. Mo., June 18, 1888; 8 S. W. Rep. 800.

51. CRIMINAL LAW—Two Indictments. —— An indictment is not illegal and void because another indictment has already been found for the same offense, under Arkansas law.—*Hudspeth v. State*, S. C. Ark., June 30, 1888; 9 S. W. Rep. 1.

52. CRIMINAL LAW—Two Sentences—Terms.——Under California law, when a prisoner receives two sentences of imprisonment on the same day, the warden of the prison must examine the records to ascertain which is the first sentence, and the second begins on the termination of the first. — *Ex parte Kirby*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 655.

53. DAMAGES—Administrator—Intestate. ——Damages recoverable by an administrator in Oregon for causing death of his intestate, do not include anything but what is consequent on the death; this bars expenses of illness prior to death. — *Holland v. Brown*, U. S. D. C. (Oreg.), May 22, 1888; 35 Fed. Rep. 43.

54. DAMAGES—Negligence.——Where the defendant's servants fail to use available means to prevent an injury the principal is liable.— *Railroad v. Colman*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 875.

55. DEED—Covenant—Warranty—Title. —— The recovery of the consideration money in a suit upon a covenant of title, is a bar to an action on a covenant of warranty contained in the same deed. — *Leggett v. Lippincott*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 677.

56. DEED—Estate—Habendum. —— Where the grant is in fee simple and the *habendum* conveys but a life estate, the estate conveyed is absolute under the grant.—*Ratliffe v. Marrs*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 876.

57. DEED—Execution—Witness — Subscription.——It is not necessary that the grantor in a deed shall subscribe it in the presence of both witnesses. It is sufficient if he sign it and acknowledge it in the presence of one witness who then subscribes it, and afterwards acknowledges it in the presence of the other witness who then subscribes it — *Little v. White*, S. C. S. Car., July 13, 1888; 7 S. E. Rep. 72.

58. DEPOSIT—Replevin—Bank—Insolvency.—— Where a deposit is made in a bank which suspends before the entry is made on the books, the depositor may maintain replevin therefor. — *Furber v. Stephens*, U. S. C. C. (Mo.), May 5, 1888; 35 Fed. Rep. 17.

59. DRAINAGE—Assessment—Foreclosure—Statute.—— The statute of Illinois authorizing procedure to sell lands on which taxes have remained unpaid for two years, does not apply to procedure to enforce assessments under the drainage laws of the State. — *Samuel v. Drainage Commissioner*, S. C. Ill., June 14, 1888; 17 N. E. Rep. 829.

60. DRAINAGE—Assessment—Release — Statutes. —— Construction of Illinois statutes relative to drainage assessments therefor, release of lands improperly assessed, and procedure under such statutes.—*Russell, etc. Co. v. Benson*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 814.

61. DUE PROCESS OF LAW—Habeas Corpus.——A person who has been duly tried by a State court for violating its local option law cannot be said to be deprived of his liberty without due process of law when imprisoned under it. — *Ex parte Kinnebreed*, U. S. C. C. (Ga.), March 19, 1888; 35 Fed. Rep. 52.

62. EJECTMENT—Pleading—Amendment—Equity.—— A plaintiff in ejectment cannot by amendment require a defendant to specifically perform a contract by conveying land, thus transforming his suit into a bill in equity for specific performance.— *Johnson v. Griffin*, S. C. Ga., April 18, 1888; 7 S. E. Rep. 94.

63. EJECTMENT—Value of Land—Waiver of Errors.—— Where plaintiff in ejectment elects in the subsequent proceedings to receive the value of the land, he waives all prior errors.— *Price v. Allen*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 609.

64. ELECTIONS — Saloon Opening — Proof. —— The burden of proving that a saloon was opened for other than drinking purposes on election day is on the defendant. — *Choell v. State*, Tex. Ct. App., June 16, 1888; 8 S. W. Rep. 816.

65. EMINENT DOMAIN — Bond — Statute. —— When damages have been awarded under the eminent domain act, the railroad company may enter upon the land upon paying the damages, and if an appeal is taken it may enter upon the land by giving a bond for the damages.—*Chicago, etc. Co. v. Phelps*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 769.

66. EMINENT DOMAIN — Damages. —— When land is taken for a public road, the elements of damages are whatever tends to make the remaining land of less value, including additional fences, their repairs, inconvenience of passage and the like. — *Dickinson County v. Hogan*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 611.

67. EMINENT DAMAIN — Fencing Track — Statute.—— Construction of Illinois statutes relative to the condemnation of land for railroad purposes. A railroad company is not bound to fence its track for six months after the opening of the road. Ruling as to damages during the interval.—*Centralia, etc. Co. v. Brake*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 820.

68. EQUITY—Canceling Deed—Imbecility. ——A deed made by one of unsound mind for no consideration will be set aside though no unfair advantage was taken of him nor undue influence exercised. — *Maggini v. Pezzoni*, S. C. Cal , June 20, 1888; 18 Pac. Rep. 687.

69. EQUITY—Corporation—Party Books. —— A court will not compel a corporation to produce its books where it is not a party to the suit. — *Henry v. Travelers' Ins. Co.*, U. S. C. C. (Col.), May 16, 1888; 35 Fed. Rep. 15.

70. EQUITY—Partnership — Settlement. —— Where a settlement between partners is wrong as to particular items, the court may correct it relative thereto and allow it to stand as to the residue in a suit to set aside the settlement.— *Reid v. Beyle*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 614.

71. EQUITY—Pleading—Laches — Fraud. —— Circumstances stated under which a bill charging fraud upon the defendant's testator who had been the partner of plaintiff and charging also that such testator had procured a dissolution of partnership by false representations was held not to be multifarious, and that plaintiff was not guilty of laches having brought the suit as soon as the law allowed after the discovery of the fraud. — *Jaynes v. Geopper*, S. J. C. Mass., June 21, 1888; 17 N. E. Rep. 831.

72. EQUITY—Pleading—Supplemental Bill. —— Where the title of the original complainants in a bill in equity is wholly transferred, the transferee should seek his remedy by an original bill, in the nature of a supplemental bill and not by supplemental bill. — *Campbell v. City of New York*, U. S. C. C. (N. Y.), May 22, 1888; 35 Fed. Rep. 14.

73. EQUITY—Practice—Laches—Demurrer. ——Where the delay in bringing a suit in equity is less than the time fixed by the statute of limitations, the questions arising are of mixed law and fact and cannot be passed on on demurrer.—*Beekman v. Railroad*, U. S. C. C. (N. Y.), April 27, 1888; 35 Fed. Rep. 4.

74. ESTOPPEL — Corporation — Title. —— A party is estopped from questioning the corporate existence of a body through which alone they derive title.—*Beekman v. Railroad*, U. S. C. C. (N. Y.), April 27, 1888; 35 Fed Rep. 4.

75. ESTOPPEL—Practice—Executor. —— The sureties on an executor's bond after reversal of a case, brought by them to prevent misappropriation of funds for failure of legatees to charge a cause of action by a cross bill, may show after issue is properly joined that the

executor was only a trustee, in the acts complained of, and they stood released.—*Allen v. Kennedy*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 882.

76. ESTOPPEL IN PAIS—Laches.——An attaching creditor, having for a period of fourteen years ignored a parol partition of lands, accompanied by occupation under it, cannot assert title required under such a partition against subsequent recorded rights and titles to such lands.— *Nave v. Smith*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 796.

77. EVIDENCE — Admissions — Depositions. —— The deposition of a party to a suit, taken by his adversary, may be read in evidence against him in such suit, whether he is present or absent. — *Bogie v. Nolan*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 14,

78. EVIDENCE—Deceased Person—Statute. ——Under the statute prohibiting parties from testifying against the representatives of a deceased person, it is held that the statute applies only to facts occurring before the death of that person, and that the testimony of a widow that after the death of her husband she found a deed among his papers is competent.—*Griffin v. Griffin*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 782.

79. EXECUTION—Evidence.——Where one claims certain property levied on as the property of his wife, it is proper for the other party to show that nothing is assessed to him. — *Smokey v. Johnson*, S. C. Miss., March 19, 1888; 4 South. Rep. 788.

80. EXECUTION—Land — Equity. —— Where the personal estate of deceased is insufficient to pay his debts, and his realty is in possession of his heirs, Missouri law furnishes an adequate remedy for their payment, and equity has no jurisdiction to grant the administrator relief by a bill against the heirs for an accounting for sums received from him and for the rents of the land. — *Priest v. Spier*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 12.

81. EXECUTOR'S BOND—Liability—Will.——Where the specific requisites of a will are complied with, the executor may be a trustee as to other corrections of the instrument, as to which latter his sureties are not bound.— *Allen v. Kennedy*, Ky. Ct. App., June 16, 1888; 8 S. W. Rep. 883.

82. EXECUTORS AND ADMINISTRATORS— Assets—Mortgage—Foreclosure—Parties. —— An administrator who holds the land of his intestate as assets, is the only necessary party defendant to an action to foreclose a mortgage made by the intestate.— *Merritt v. Daffin*, S. C. Fla., July 17, 1888; 4 South. Rep. 806.

83. EXEMPTIONS—Failure to Claim. ——Where exempt property is excluded from an assignment and the grantor fails to make claim, the court will apply it to the plaintiff's debt.—*Bank v. Payne*, Ky. Ct. App., Dec. 17, 1887; 8 S. W. Rep. 857.

84. FACTORS AND BROKERS — Disobedience to Orders—Proximate Cause. —— Where a factor disobeys the orders of his principal to make immediate sale of his cotton, which is destoyed by fire after the receipt of such orders, such disobedience is not the proximate cause of the loss, and the factor is not liable for it. — *Lehman v. Pritchett*, S. C. Ala., June 26, 1888; 4 South. Rep. 601.

85. FENCE—Master and Servant — Negligence. —— A railroad company in Colorado are not required to fence their track, and are therefore not liable for the death of one of its engineers caused by a collision with cattle on the track.—*Cowan v. Railroad*, U. S. C. C. Col., May 12, 1888; 35 Fed. Rep. 43.

86. FENCES—Pulling Down—Adjoining. —— An occupant of a farm may pull down a panel of a dividing fence for his convenience without being liable criminally under the statute. — *Hooks v. State*, Tex. Ct. App., June 13, 1888; 8 S. W. Rep. 803.

87. FISHERIES—Oyster- Beds—Title.—Circumstances stated under which a party acquired title to oysters that had attached themselves to his shells. — *Grace v. Willets*, N. J. Ct. Err. App., May 23, 1888; 14 Atl. Rep. 559.

88. FRAUD—Fertilizers — Penalty — Indictment. —— Construction of Maryland statutes relative to fraud in the manufacture of fertilizers, the recovery of penalties imposed by that statute, and indictment under it.— *Snowden v. State*, Md. Ct. App., June 13, 1888; 14 Atl. Rep. 528.

89. FRAUD — Fraudulent Conveyance — Laches. —— Where a party filed a bill to set aside certain conveyances made thirty years before, on the ground of fraud, and afterwards sought to amend the bill by setting out alleged fraudulent representations: *Held*, that he could not do so as he had been guilty of laches. — *Barton v. Long*, N. J. Ct. Chan., June 6, 1888; 14 Atl. Rep. 566.

90. FRAUDS—Statute of—Memorandum— Signing.—— It is sufficient that the party sought to be charged has signed the memorandum required by the statute of frauds, but it is necessary that the other party shall have accepted or assented to the terms of agreement.— *Case T. M. Co. v. Smith*, S. C. (Oreg.), June 7, 1888; 18 Pac. Rep. 641.

91. FRAUDULENT CONVENANCE—Consideration—Parent and Child.—— Circumstances stated under which a transfer of real estate from a father to his children will not be held fraudulent at the instance of a judgment creditor, although the transfer was made pending an appeal, the transfer being upon a valuable consideration.—*Low v. Wartman*, N. J. Ct. Err. & App., June 19, 1888; 14 Atl. Rep. 586.

92. GUARDIAN AND WARD— Bond — Equity — Probate Court.——A bill in equity by a guardian to require a settlement of his predecessor's accounts is barred by a decree of the probate court settling such predecessor's account, unless it shows special grounds for equitable interposition.—*Crumpler v. Deens*, S. C. Ala., July 17, 1888; 4 South. Rep. 826.

93. HEALTH—Quarantine—County Boards — Statute.— Construction of Florida statutes relative to quarantine, the public health and county boards of health.—*O'Donovan v. Wilkins*, S. C. Fla., July 9, 1888; 4 South. Rep. 789.

94. HIGHWAYS—Negligence—Contributory Negligence —Instruction.——In an action against county commissioners on account of injuries caused by alleged defect in the highway, an instruction that the plaintiff could not recover unless the disaster was caused by a defect in the highway, which the plaintiff could not have discovered by reasonable diligence, is erroneous. The fright of the mules was not negligence of the plaintiff unless caused by his carelessness.—*Kennedy v. County Commissioners*, Md. Ct. App., June 12, 1888; 14 Atl. Rep. 524.

95. HIGHWAYS — Statute — Dedication. —— Where a surveyor's return of the laying off of a highway was, after undue delay, recorded, without leave of court, and a road in substantial conformity with it was afterwards opened: *Held*, that the right to the highway existed by dedication, and not by virtue of the return.— *State v. Stillwell*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 563.

96. HOMESTEAD—Fraudulent Conveyance.—— When a conveyance from husband to wife is set aside as fraudulent, the husband is entitled to a homestead in the land so attempted to be conveyed.—*Wood v. Timmerman*, S. C. S. Car., July 13, 1888; 7 S. E. Rep. 74.

97. HOMESTEAD—Life Estate—Curtesy.—— A homestead, the title to which was vested in the wife, and after her death the husband continues so to occupy it, he being the head of a family of children, his estate by curtesy is not subject to a lien of a judgment obtained against him after his wife's death, homestead rights attaching to a life estate as well as to a fee.—*Kendall v. Powers*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 793.

98. HOMESTEAD—Rights of Widower.——Under California law, the husband of a deceased wife, who left more than one child, inherits only one-third of her separate real estate, set apart in her life-time as a homestead.—*Beck v. Soward*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 650.

99. HUSBAND AND WIFE — Separate Estate. —— Cir-

cumstances stated under which a wife was held to be entitled to have vested in her, to her sole and separate use, certain land which her husband had bought with her money and had taken the title in his own name.—*Barrett v. Toley*, N. J. Ct. Chan., June 8, 1888; 14 Atl. Rep. 571.

100. HUSBAND AND WIFE—Separate Estate—Evidence. ——Upon a bill filed by a wife to charge her husband as trustee for her of lands held in his name, the bill will be dismissed if the evidence shows clearly that the land was paid for with the husband's money.—*Thor v. Oleson*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 780.

101. INDICTMENT—Information — Filing. —— The requirement of an oath to a criminal information is fulfilled when it appears that the evidence upon which it proceeds is upon oath, though the information was not sworn to.—*United States v. Polite*, U. S. D. C. (S. C.), May 15, 1888; 35 Fed. Rep. 58.

102. INJUNCTION—Dissolution—Judgment.—— An injunction to restrain a judgment will be dissolved if it appears that nothing is in question in the equity suit which was not decided in the action at law.—*Johnson v. Smokey*, S. C. Miss., March 19, 1888; 4 South. Rep. 788.

103. INJUNCTION— Trespass — Pasturage. —— An injunction will not be granted to restrain a party from pasturing his sheep on unfenced alternate sections, owned by plaintiff, scattered through a tract forty miles long by thirty-six miles wide.—*Buford v. Houtz*, S. C. Utah, June 26, 1888; 18 Pac. Rep. 633.

104. INSURANCE — Accident — Policy — Voluntary Exposure.——Circumstances stated under which a person was held to be guilty of "voluntary exposure to danger," within the terms of an accident policy.—*Travelers', etc. Co. v. Jones*, S. C. Ga., March 28, 1888; 7 S. E. Rep. 83.

105. INSURANCE—Appraisal—Policy.——It is competent for an insurance company to insert in the policy a condition that the goods insured should be appraised. *Liverpool, etc. Co. v. Wolf*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 561.

106. INSURANCE — Mutual Benefit — Beneficiary. —— Where the constitution of a mutual benefit association provides that a stated sum shall be paid upon the death of a member to the person designated in writing as the beneficiary, allowing a change of beneficiary upon application to the secretary, the member may designate the beneficiary by will, when a beneficiary was designated without his direction.—*Mutual Companions v. Griest*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 652.

107. INSURANCE—Policy—Suspension. —— Where the business of a cotton factory is suspended for a season, the watchman being still on duty, the policy is not forfeited, although by its terms it is to be forfeited if the operation of the factory shall be discontinued.—*American, etc. Co. v. Brighton, etc. Co.*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 771.

108. INSURANCE — Premium —Contract.—— Where a party seeking insurance on his life has made some effort to pay the premium necessary to pertect the contract, but not done all that he could, the company is not liable.—*Crunkhite v. Ins. Co.*, U. S. C. C. (Colo.), May 16, 1888; 35 Fed. Rep. 26.

109. INSURANCE—Prior Policy — Risk. —— Where an assured seeks reinsurance from insuring company for new risks, which the company refuses to take, the taking of a policy for them in another company avoids the first policy, and does not make a case of double insurance.—*Leibrandt v. Fireman's Ins. Co.*, U. S. C. C. (Md.), May 17, 1888; 35 Fed. Rep. 30.

110. INTOXICATING LIQUORS—Local Option—Constitutionality. —— The discrimination clause in favor of domestic wines and cider, in the Georgia local option law, is inoperative, so far as it discriminates against wines from other States; and so construed, is not obnoxious to the constitution of the United States, giving to congress the power to regulate interstate commerce.—*Ex parte Kinnebrew*, U. S. C. C. (Ga.), March 19, 1888; 35 Fed. Rep. 62.

111. INTOXICATING LIQUORS—Local Option Laws.—— The local option law of Missouri is constitutional.—*Ex parte Swann*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 10.

112. JUDGMENT—Appeal—Order.—— An order to refund money paid out under order of court is such a judgment as may be appealed from.—*City v. Kaye*, Ky Ct. App., April 5, 1888; 8 S. W. Rep. 869.

113. JUDGMENT—Deed—Unrecorded Deed—Lien. ——A judgment has a lien superior to the title conferred by an unrecorded deed, unless there has been such possession under the deed as would put the judgment creditor upon inquiry.—*King v. Paulk*, S. C. Ala., July 17, 1888; 4 South. Rep. 825.

114. JUDGMENT—Evidence—Privity. —— A judgment in one suit is not evidence in an action between different parties, although the United States is one of the parties. Privity with the government must appear as well as privity with individuals.—*Barton v. Long*, N. J. Ct. Chan., June 5, 1888; 14 Atl. Rep. 565.

115. JUDGMENT—Lien.—— Circumstances stated under which it was held that the question whether payment of a judgment had been made did not depend upon specific performance of a contract to buy land, but upon the question of fact whether the money paid had been a loan or an advance payment on the land.—*Miller v. Klugh*, S. C. S. Car., July 13, 1888; 7 S. E. Rep. 67.

116. JUDGMENT — Res Adjudicata — Amendment.—— Where the supreme court has decided that a party has lost his remedy by his failure to exercise due diligence, he cannot avail himself of an amendment in the trial court to renew the question; whether he had exercised such diligence is *res adjudicata*.—*Lowry v. Davenport*, S. C. Ga., April 13, 1888; 7 S. E. Rep. 91.

117. JUDGMEET—Set-off. —— One judgment may be set-off against another.—*Henry v. Travelers' Ins. Co.*, U. S. C. C. (Colo.), May 16, 1888; 35 Fed. Rep. 15.

118. JURISDICTION — Federal Question. —— Whether the objectionable part of a local option statute may be separated and the rest stand alone is not a federal question.—*Ex parte Kennebrew*, U. S. C. C. (Ga.), March 19, 1888; 35 Fed. Rep. 52.

119. JURISDICTION—Statute—Damages.——In the absence of a statute, there is no right of action for injuries resulting in death.—*Holland v. Brown*, U. S. D. C. (Oreg.), May 22, 1888; 35 Fed. Rep. 47.

120. JURY—New Trial. —— Where a juror, actually serving on a jury, is incompetent to perform that duty, and the mistake by which he was placed on the panel might have been discovered by due diligence, a new trial will not be granted.— *Burns v. State*, S. C. Ga. March 28, 1888; 7 S. E. Rep. 88.

121. JURY—Statute.—- Construction of Illinois statute relative to filling up the panels of juries when at the opening of the court they are deficient.—*People v. Board of Supervisors*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 802.

122. LARCENY—Indictment — Error In. —— The word "appriate" used instead of "appropriate" is fatal in an indictment for larceny. — *Jones v. State*, Tex. Ct. App., June 13, 1888; 8 S. W. Rep. 801.

123. LIBEL — Privilege — Judicial Proceeding. —— A statement by a receiver in his report to the court charging that his coreceiver had embezzled the funds and was guilty of contempt of court, having been made in a judicial proceeding, is not libelous, although the statement is both false and malicious. — *Bartlett v. Christhilf*, Md., Ct. App., June 13, 1888; 14 Atl. Rep. 518.

124. LIMITATIONS—Penalty—Action. —— An action to recover a penalty against a railroad company is barred in one year, under the statute of Colorado. — U. S. C. C. (Colo.), May 12, 1888; 35 Fed. Rep. 35.

125. LIMITATION OF ACTION—Adverse Possession.—— Where a son bought from his mother all her interest in the lands which descended from his father, and held the same for nine years: *Held* that, by adverse possession and the statute of limitation, he had a clear title to the land against her children by a second marriage. —

Baldwin v. Ratcliff, S. C. Ill., June 16, 1888; 17 N. E. Rep. 794.

126. LIMITATION OF ACTION — Adverse Possession — Color of Title— Statute. —— A conveyance of a line of railroad and "all the real and personal property used in operating the same," is not color of title to land occupied by the railroad, to which no other title appears, within the terms of the statute of Illinois providing that possession under color of title for a prescribed period will make a good title.— *Ohio, etc. Co. v. Barker*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 797.

127. LIS PENDENS — Federal Jurisdiction. —— The pendency of a suit by railroad trustees to foreclose a mortgage in the State court, is no bar to a similar suit by a bondholder secured thereby in the Federal court. — *Beekman v. Railroad*, U. S. C. C. (N. Y.), April 27, 1888; 35 Fed. Rep. 3.

128. MANDAMUS—Municipal Corporations—Ferry.—— A city in the exercise of its discretionary powers may refuse a franchise for a ferry, and will not be liable to *mandamus* proceedings for so doing.— *State v. Cramer*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 788.

129. MASTER AND SERVANT — Duty — Repair. —— A promise to repair will bind the master, where the danger from failure was not so imminent that one of ordinary prudence would not have continued the employment. — *McDowell v. Railroad*, Ky. Ct. App., June 7, 1888; 8 S. W. Rep. 871.

130. MASTER AND SERVANT — Fellow servants — Locomotive Engineers.——Locomotive engineers are fellow-servants, and in Colorado the company employing them is not liable for personal injuries resulting to one from the negligence of another in a collision. — *Van Avery v. Railroad*, U. S. C. C. (Colo.), May 7, 1888; 35 Fed. Rep. 40.

131. MASTER AND SERVANT — Negligence of Fellow-servant — Evidence. —— In an action by a servant against his employer for injuries sustained from the negligence of a fellow-servant, a book kept by the employer's agent showing prior negligence by such fellow-servant is admissible in evidence.— *O'Hare v. Chicago & A. R. R.*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 23.

132. MINES—Adverse Suit—Issue. —— In an action to determine an adverse claim filed against an application for a patent to a mining location, the issue is whether either party is entitled to a patent.—*Manning v. Strehlow*, S. C. Colo., June 15, 1888; 18 Pac. Rep. 625.

133. MURDER—Instructions—Evidence.——Where the evidence tends only to establish murder in the first degree, the court may refuse to charge as to the inferior grades of the crime. — *Trumbell v. State*, Tex. Ct. App., June 16, 1888; 8 S. W. Rep. 814.

134. MURDER — Instruction — Evidence. —— It is not error for the trial court to omit instructions for less degrees of murder than first, in the absence of evidence of a lower degree. — *Cook v. Commonwealth*, Ky. Ct. App., June 12, 1888; 8 S. W. Rep. 872.

135. MUNICIPAL CORPORATIONS — City of St. Louis — Non liability.—— The city of St. Louis is not liable for injuries sustained by reason of defects in its court house, its relations being the same in such regard as the respective counties hold, and it is not liable unless the right of action be given by statute. — *Cunningham v. City of St. Louis*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 787.

136. MUNICIPAL CORPORATION—Officer—Removal.—— Construction of New Jersey statutes relative to the removal of officers of police boards of municipal corporations.—*Clark v. City of Cape May*, S. C. N. J., June 16, 1888; 14 Atl. Rep. 581.

137. MUNICIPAL CORPORATION — Officer — Removal — Statute. —— Construction of New Jersey statutes affecting the chief of police of the city of Trenton. By authority of what statute and by what procedure he may be removed.—*State v. Inhabitants of City of Trenton*, S. C. N. J., March 9, 1888; 14 Atl. Rep. 578.

138. MUNICIPAL CORPORATIONS—Ordinance—Cruelty to Animals.——The city of St. Louis is authorized to pass ordinances for the prevention of cruelty to animals when the same is consistent with the laws of the State on that subject. — *City of St. Louis v. Schoenbusch*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 791.

139. MUNICIPAL CORPORATIONS — Warrants — Assignments. —— When the board of supervisors have ordered payment of a judgment against the city of San Francisco to be made to the judgment creditor, the auditor has no authority to draw his warrant in favor of the assignee of the judgment.— *Sheever v. Edgar*, S. C. Cal., June 15, 1888; 18 Pac. Rep. 681.

140. NEGLIGENCE—Contributory Negligence. ——Circumstances stated under which a railroad company was held not to be liable for fatal injuries suffered by a passenger and occasioned by his own indiscretion and negligence. — *Chicago, etc. Co. v. Felton*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 755.

141. NEGLIGENCE— Danger — Trespasser — Demurrer. ——A complaint for damages which shows plaintiff to have been a trespasser is demurrable. — *McDonald v. Railroad*, U. S. C. C., May 3, 1888; 35 Fed. Rep. 38.

142. NEGLIGENCE—Joint Liability — Carriers. —— On two ferry boats colliding a passenger on one of them was killed, the evidence showed that either boat might by proper handling have avoided the collision: *Held*, that both were liable *in solido*, under Oregon statute. — *Holland v. Brown*, U. S. D. C. (Oreg.), May 22, 1888; 35 Fed. Rep. 44.

143. NEGLIGENCE—Master and Servant— Pleading.—— The complaint by a servant against the master should allege that it was the duty of the master to use "reasonable care and diligence" in maintaining proper appliances.—*Canter v. Mining Co.*, U. S. C. C. (Colo.), May 4, 1888; 35 Fed. Rep. 41.

144. NEGLIGENCE—Railroad Company.—— A railroad compay is liable for injuries to a child seven years old who was riding upon an engine, and was injured by getting off, under the orders of the engineer, while the engine was in motion.—*Chicago, etc. Co. v. West*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 788.

145. PARENT AND CHILD — Chattel Mortgage — Execution—Injunction. —— Where a father engages his son to work for him after arriving at his majority, and gives him a chattel mortgage to secure his wages, an injunction will issue to restrain the sale of the mortgage property under an execution against the father. — *Stratton v. Packer*, N. J. Ct. Chan., June 25, 1888; 14 Atl. Rep. 587.

147. PARTITION—Stipulation—Decree.— When parties to a partition suit stipulate for a division of the property, but include therein property not mentioned in the suit, the court cannot render any decree on the stipulation.— *Bank of Healdsburg v. Hitchcock*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 648.

147. PARTNERSHIP — Mistake — Probate Court. —— A mistake made by a committee appointed by a probate court to settle the affairs of a partnership will authorize a setting aside of the report and the correction of the mistake. — *Gage v. Gage*, S. C. N. H. July 19, 1888; 14 Atl. Rep. 869.

148. PARTNERSHIP—Release—Usury. —— A release by one member of a firm of a firm's right to a penalty for usury is good. —*Stout v. Bank*, S. C. Tex., Dec. 9, 1887; 8 S. W. Rep. 808.

149. PARTNERSHIP — Rights of Creditors. —— Where copartners retire from a firm, leaving one member sole owner, who confesses judgment in favor of his individual creditors, making the statement required by statute, and no fraud is shown, such creditors are entitled to the proceeds of the property received from the firm in preference to firm creditors.— *Brown v. Miller*, S. C. Colo., June 8, 1888; 18 Pac. Rep. 617.

150. PATENTS—Boiler Inspectors—Comity. ——Following decision of Illinois circuit, patent 185,861 to J. T. Hancock for boiler injector, held void. — *Hancock v. Regestee*, U. S. C. C. (Md.), May 5, 1888; 35 Fed. Rep 61.

151. PATENTS — Infringement — Bustles. —— Patent 164,34[illegible], to A. W. Thomas, on bustles, is not infringed by

a device not having the upright extension of the Thomas patent.—*Thomas v. Williams*, U. S. C. C. (Conn.), May 4, 1888; 35 Fed. Rep. 71.

152. PATENTS—Infringement—Car Coupling. —— The first claim of patent 326,401, to F. A. Casey, for car coupling, is infringed by a device having a draw-head, with a hook pivoted below the line of draw, as shown in the Butterfield patent, 327,066.—*Casey v. Butterfield*, U. S. C. C. (Mass.), May 11, 1888; 35 Fed. Rep. 77.

153. PATENTS — Infringement — Waxed Paper. —— Siegfried and Hammerschlag's reissued patent No. 8,460, is infringed by what is known as the "Spalding machine" for waxing paper.—*Hammerschlag v. Spalding*, U. S. C. C. (Mass.), Nov. 17, 1888; 35 Fed. Rep. 66.

154. PATENTS—Invention.——Patent 272,660, to A. A. Cowles, for electric conductors, is void for want of invention.—*Brass Co. v. Supply Co.*, U. S. C. C. (Conn.), May 18, 1888; 35 Fed. Rep. 68.

155. PATENTS — Jurisdiction. —— The jurisdiction of the federal courts in patent causes does not apply to matters concerning patents that arise solely out of contracts.—*Brooklyn, etc. Co. v. Leach*, U. S. C. C. (N. Y.), April 16, 1888; 35 Fed. Rep. 2.

156. PATENTS—Non infringement — Switch Stands.—— Patent 273,450, for switch stands, is restricted to its specified elements, and the omission of any of these would not infringe.—*Brahm v. Ramapo Iron Works*, U. S. C. C. (N. Y.), May 11, 1888; 35 Fed. Rep. 64.

157. PATENTS—Novelty.——Reissue patent 10,284, to J. M. Pfandler, for regulating gas, is void for want of novelty.—*Consolidated Co. v. Schoenhofen, etc.*, U. S. C. C. (Ill.), May 21, 1888; 35 Fed. Rep. 73.

158. PATENTS—Reissue — Waxed Paper — Laches.—— Reissued patent 8,460, for process of waxing paper, is not void for fourteen months' delay, where the question has not been raised in intermediate litigation.—*Hammerschlag Mfg. Co. v. Spalding*, U. S. C. C. (Mass.), May 8, 1888; 35 Fed. Rep. 67.

159. PATENTS—Switches—Infringement. —— Claim of patent 218,110, for switch stands, is void, showing no invention above ordinary mechanical skill.— *Brahn v. Ramapo Iron Works*, U. S. C. C. (N. Y.), May 11, 1888; 35 Fed. Rep. 63.

160. PATENTS—Switches— Priority. —— When an inventor is notified by the patent-office of prior claims, limiting the scope of his patent, he must insist upon his rights, or the priority will be taken as conceded.—*Brahn v. Ramapo Iron Works*, U. S. C. C. (N. Y.), May 11, 1888; 35 Fed. Rep. 63.

161. PAYMENT—Evidence. —— Circumstances stated under which it was held that certain checks were given in payment of a loan made by one of the parties to the other, the evidence being sufficient to establish these facts.—*Woodruff v. McIntyre*, N. J. Ct. Chan., June 12, 1888; 14 Atl. Rep. 572.

162. PHYSICIANS—Certificate—Revocation — Statute.—Under the statute of Illinois, authorizing in certain cases the revocation of a physician's certificate: *Held*, that certain advertisements, recited in the opinion, do not authorize such revocation.—*People v. McCoy*, S. C. Ill., June 16, 1888: 17 N. E. Rep. 786.

163. PLEADING—Special Plea—Evidence.——A plea of accord and satisfaction and covenant not to sue was held not to be supported by the evidence.—*Brunswick, etc. Co. v. Clem*, S. C. Ga., March 28, 1888; 7 S. E. Rep. 84.

164. PLEADING—Verdict—Aider.——When a declaration is defective in form, the defect is not cured by verdict, when defendant at the close of the evidence asks for the proper peremptory instruction.—*Hazard P. Co. v. Volger*, S. C. Wyo. Ter., June 12, 1888; 18 Pac. Rep. 636.

165. POST-OFFICE — Stealing Mail.— The only offense punishable by § 5467, Rev. Stat. U. S., is "the stealing or taking," etc., by a postal employee; it does not reach mere destruction of a letter.—*United States v. Grurer*, U. S. D. C. (S. Car.), May 16, 1888; 35 Fed. Rep. 59.

166. PRACTICE—Bill of Exceptions—Time of Signing.—When time is granted till the next term to prepare a bill of exceptions, the judge may sign it at any time during the term granted, under Wyoming law.—*McBride v. Union Pac. R. Co.*, S. C. Wyo. Ter., June 11, 1888; 18 Pac. Rep. 635.

167. PRACTICE—Equity—Examiners.——The power of the United States circuit court to appoint examiners to take testimony outside its jurisdiction is doubtful.—*Arnold v. Chesebrough*, U. S. C. C. (N. Y.), April 10, 1888; 35 Fed. Rep. 16.

168. PRACTICE—Exceptions—Notice — Waiver. —— A notice for a rule to show cause why a new trial should not be granted if made by a party who has filed a bill of exceptions, is a waiver of all exceptions not stated in the rule.—*Finley v. Handley*, S. C. N. J., June 11, 1888; 14 Atl. Rep. 585.

169. PRACTICE — New Trial — Settlement. —— Under California law, when the judge fixes the time for a hearing in settling the statement for a new trial, and the clerk has notified the parties, it is the duty of the judge to proceed to settle the statement.—*Mellor v. Crouch*, S. C. Cal., June 18, 1888; 18 Pac. Rep. 685.

170. QUO WARRANTO—Information—Corporation.—— In a *quo warranto* procedure to test the legality of a corporation, the *de facto* corporation is the proper defendant to the information.—*State v. Commissioners*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 560.

171. RAILROADS—Bonds—Action.——On dismissal of an action brought in a State court to foreclose a mortgage on a railroad by trustees, a bondholder may individually sustain his action for the accrued and unpaid interest coupons.—*Beckman v. Railroad*, U. S. C. C. (N. Y.), April 27, 1888; 35 Fed. Rep. 4.

172. RAILROADS—Discrimination—Pleading. ——In a suit against a railroad for unjust discrimination in freight charges, the petition need not show what was a reasonable charge for the freight.—*Goodridge v. Railroad*, U. S. C. C. (Cal.), May 12, 1888; 35 Fed. Rep. 35.

173. RAILROADS—Municipal Aid — Liability.——A city embracing in its charter limits substantially the same population and territory as the old town, which had forfeited its charter, becomes liable for the indebtedness of the town on account of railroad aid.—*Hill v. City of Kahoka*, U. S. C. C. (Mo.), May 14, 1888; 35 Fed. Rep. 32.

174. RAILROADS—Passenger—Ejection.——A passenger on a train, who has no ticket and refuses to pay his fare, may be ejected from the train, but no more violence should be used than is necessary for that purpose.—*Jardine v. Cornell*, S. C. N. J., June 20, 1888; 14 Atl. Rep. 590.

175. RAILROAD COMPANY — Licensees. —— Where a railroad company has offices accessible to the street for the transaction of its business, a person having business with it, who is in its yards, is at best a licensee, and not entitled to special protection.—*Diebold v. Pennsylvania, etc. Co.*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 576.

176. REMOVAL OF CAUSES—Non-resident's Citizenship. —— Under the act of 1887, United States circuit courts will take cognizance by removal where a citizen of another State was sued in the State court where the plaintiff resided. — *Swayne v. Bolston*, U. S. C. C. (N. Y.), March 22, 1888; 35 Fed. Rep. 1.

177. REPLEVIN—Judgment— Amendment. —— After two full statute terms of court in Illinois have passed since entry of judgment of dismissal in replevin, the court has no power to enter a judgment for return of the property.—*Cammeyer v. Durham, etc.*, U. S. C. C. (Ill.), May 16, 1888; 35 Fed. Rep. 51.

178. RESERVATION—West Point— Jurisdiction. — The United States circuit court for the southern district of New York has jurisdiction in the territory of the United States reservation at West Point, N. Y. — *Beckman v. Railroad*, U. S C. C. C. (N. Y.), April 27, 1888; 35 Fed. Rep. 3.

179. REWARD—Railroad Company.——It is competent for a railroad company to offer by standing notice a reward for the arrest and conviction of persons ob-

structing its track, and such offer is binding upon the company. — *Central, etc. Co. v. Cheatham*, S. C. Ala., July 17, 1888; 4 South. Rep. 828.

180. SALE—Action for Price — Instructions — Tags — Statute. —— Where, by the law of a State, tags are required to be placed on certain merchandise when sold, an instruction that if the tags were placed upon the goods in another State and torn off before the sale, the plaintiff cannot recover, is correct. — *Clark's, etc. Co. v. Dowling*, S. C. Ala., June 27, 1888; 4 South. Rep. 604.

181. SALE—Fertilizers.—— In 1883, a sale of fertilizers could only be valid if each sack bore the inspector's tag and the manufacturer's guaranty of the analysis.— *Allen v. Pearce*, S. C. Ga., March 25, 1888; 7 S. E. Rep, 82.

182. SALE — Rescission— Fraudulent Representatives. —— Where the vendee of merchandise, in answer to a question by the vendor, falsely understates the amount of his debts, although he claims that he stated only his merchandise debts, and not money loaned to him, the vendor is entitled to rescind the contract and take back the goods as against a mortgagee to whom they were conveyed to secure that loan money. — *Collins v. Cooley*, N. J. Ct. Chan., June 16, 1888; 14 Atl. Rep. 574.

183. SALE—Surety—Agreement.—— A surety for purchase money at a judicial sale is bound by a subsequent agreement made for his benefit and exceeding the original conditions of suretyship. — *City v. Kaye*, Ky. Ct. App., April 5, 1888; 8 S. W. Rep. 869.

184. SALVAGE—Fire—Quickness of Service.——Prompt service is required in case of fire, and a claim for salvage made by a tug for towing out of danger will be modified for the want of it.— *The Bessie Whiting*, U. S. D. C. (N. Y.), April 25, 1888; 35 Fed. Rep. 79.

185. SLANDER— Counsel — Privilege. —— Slanderous words spoken by a counsel in the course of a trial are actionable if they do not relate to the procedure in question.— *Maulsby v. Reifsnider*, Md. Ct. App. June 13, 1888; 14 Atl. Rep. 505.

186. SLANDER—Witness—Privilege.——It is not slander for a witness to say, "not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I had, I would have noticed the date and all those little particular incidents." These words held to be sufficiently pertinent to the issue to be within the privilege of a witness. — *Hunckel v. Voneiff*, Md.Ct. App., June 13, 1888; 14 Atl. Rep. 500.

187. STATUTE—Power.——Where, under the language of a statute, it appears that a particuler power was granted, and nothing to the contrary appears in other parts of the statutes, such power will be held to have passed by the terms of the statute. — *Saunders v. Provisional, etc.*, S. C. Fla., July 17, 1888; 4 South. Rep. 801.

188. STATUTES—Record— Impeaching. —— The court will not look to the legislative journal, nor receive verbal testimony, to impeach the record in the office of the secretary of the territory as to the due passage of a statute. — *Territory v. Clayton*, S. C. Utah, June 26, 1888; 18 Pac. Rep. 628.

189. TAXATION—Back Taxes — Evidence. —— Rev. St. Mo. 1879, providing that a certified tax-bill shall be *prima facie* evidence, applies only to back tax-bills, made from delinquent lists conforming to the revenue act of 1872. — *State v. Scott*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 21.

190. TAXATION—Collection— Revenue—Agent—Statute. ——Construction of Mississippi statutes relative to the office of revenue agent. Such an agent holds his office under the statute for four years only, and a suit brought by him on a tax-collector's bond after that time does not bar a subsequent action by the State.— *State v. Bias*, S. C. Miss., May 21, 1888; 4 South. Rep. 785.

191. TELEGRAPH COMPANY — Corporation — License — Res Adjudicata. —— Where a telegraph company obtained a license to erect and operate a telegraph line along a certain railroad as long as it continued to exist as a telegraph company, and assigned its franchise to another company whose charter expired in 1877 and was then renewed under a different name: *Held*, that the latter company was bound by the decision of the United States court relative to that line of railroad and that the license had expired. — *Western, etc. Co. v. Baltimore, etc. Co.*, Md. Ct. App., June 13, 1888; 14 Atl. Rep. 531.

192. TROVER — Ownership — Instruction. —— In an action against a sheriff for seizing goods of plaintiff on a process against another, it is error to instruct that plaintiff is entitled to a verdict if he was in possession of the goods at the time of the seizure. — *Zaro v. Dakan*, S. C. Cal., June 15, 1888; 18 Pac. Rep. 680.

193. TRUSTS—Assignment—Notice. —— When the assigned of a bond, holding the title for the assignee, conveys to the widow of the assignee who has knowledge thereof, without consideration, she acquires no title. — *Grant v. Hevenin*, S. C. Cal., June 1, 1888; 18 Pac. Rep. 647.

194. TRUSTS — Implied — Equitable Mortgage. —— A, having a certificate for State land not fully paid for, gave it as collateral to B to secure a note, and subsequently mortgaged the land to C. The land was sold by the trustee to C. B had the certificate assigned to him and obtained the patent. B and C were aware of all the transactions by A: *Held*, that B held the title in trust for C, who must pay the debt due B before he could obtain the title. — *Stewart v. Ganley*, S. C. Colo., June 15, 1888; 18 Pac. Rep. 619.

195. UNDUE INFLUENCE—Deeds—Burden of Proof.—— When plaintiff in a suit on a promissory note of a deceased party is shown to have been for a long time the physician and confidential adviser of the deceased, who was a childless widow, advanced in years and physically and mentally unsound, the burden is on him to prove that the note was given for a valuable consideration and is just. — *Bogie v. Nolan*, S. C. Mo., June 18, 1888; 9 S. W. Rep. 14.

196. USURY—Penalty— National Banks. —— Usury is consummated by a national bank when payment is made and appropriated to usurious interest. — *Stout v. Bank*, S. C. Tex., Dec. 9, 1887; 8 S. W. Rep. 808.

197. VENDOR AND VENDEE—Deed.—— The title of one in open and notorious adverse possession of land, under an unrecorded deed, is superior to the title of one who has obtained his deed during such adverse possession and with full notice thereof.— *Daniel v. Hester*, S. C. S. Car., July 13, 1888; 7 S. E. Rep. 65.

198. WILL—Construction—Equity—Pleading.——Where a widow filed a bill against her husband's executors to obtain a construction of the will and bring them to a settlement with her, and defendants pleaded that they had already settled with the orphan's court and made distribution under its orders, the bill may be amended to show this fact, and to let in proof that the widow had no notice of the settlement other than that the statutory publication; the amendment is not in violation of the rule, that the settlement of executors in such cases is condusive.— *Adams v. Adams*, N. J. Ct. Chan., June 25, 1888; 14 Atl. Rep. 575.

199. WILL — Construction — Family Settlement. —— Where there is no question of fraud or undue influence, the fact that the will of the testatrix is contrary to the family settlement does not invalidate the will. The question is one to be settled upon the final distribution of the estate. — *Appeal of Shaaber*, S. C. Penn., April 30, 1888; 13 Atl. Rep. 775.

200. WILL—Description — Issue — Adoption. —— The adoption of an illegitimate child by its father does not render it "issue" within the description of a will. — *Jenkins v. Jenkins*, S. C. N. H., March 16, 1888; 14 Atl. Rep. 557.

CORRESPONDENCE.

LINCOLN'S FIRST MURDER CASE.—The simplest story of a murder trial is always of interest, and especially so where the case is conducted on either side by men with the ability and genius that Abraham Lincoln possessed.

In the July *Century* appears the end of a story of a long case (which includes), vaguely known as Lincoln's first defense in a murder trial. The details need not be repeated. The pith of the story is instructive to lawyers.

Grayson was charged with shooting Lockwood at a camp meeting on the evening of August 9, 18 , and with running away from the scene of the killing, which was witnessed by David Sovine. The proof was so strong that, even with an excellent previous character, Grayson came very near being lynched on two occasions soon after his indictment for murder.

The mother of the accused engaged young Abraham Lincoln, as he was then called, and the trial came on to an early hearing. No objection was made to the jury and no cross-examination of witnesses, save the last and only important one, Sovine, who swore that he knew the parties, saw the shot fired by Grayson, saw him run, and picked up the deceased, who died instantly.

The proof of guilt and identity was morally certain. The attendance was large, the interest intense. Grayson's mother began to wonder why "Abram remained silent so long, and why he didn't DO SOMETHING." The people finally rested. The tall lawyer (Lincoln) stood up and eyed the strong witness in silence, without books or notes, and slowly began his defense by these questions:

Q. "And you were with Lockwood just before and saw the shooting?"

A. "Yes."

Q. "And stood near to them?"

A. "No; about twenty feet away."

Q. "May it not have been ten feet?"

A. "No; it was twenty feet or more."

Q. "In the open field?"

A. "No; in the timber."

Q. "What kind?"

A. "Beach timber."

Q. "Leaves on it thick in August?"

A. "Rather."

Q. "And you think this pistol was the one used?"

A. "It looked like it."

Q. "You could see defendant shoot, see how the the barrel hung, and all about it?"

A. "Yes."

Q. "How near was this to the meeting place?"

A. "Three-quarters of a mile away."

Q. "Where were the lights?"

A. "Up by the minister's stand."

Q. "Three-quarters of a mile away?"

A. "Yes; I answered ye *twiste*."

Q. "Did you see a candle there, with Lockwood or Grayson?"

A. "No; what would we want a candle for?"

Q. "How, then, did you see the shooting?"

A. "By moon-light," boldly.

Q. "You saw this shooting at ten at night, in beach timber, three-quarters of a mile from the lights; saw the pistol barrel, saw the man fire, saw it twenty feet away, saw it all by moon-light, saw it nearly a mile from the camp lights?"

A. "Yes; I told you so before."

The interest was now intense, as men leaned forward to catch the smallest syllable. Then the lawyer drew out a blue covered almanac from his side coat pocket, offered it in evidence, showed it to the jury and the court, read from a page with careful deliberation that the moon on that night was onseen, and only arose at *one* the next morning.

Following this climax, Mr. Lincoln moved the arrest of the perjured witness as the real murderer, saying: "Nothing but a *motive to clear himself* could have induced him to swear away so falsely the life of one who never did him harm!" With such determined emphasis did Lincoln present his showing that the court ordered Sovine arrested, and under the strain of excitement he confessed to being the one who fired the fatal shot, but denied it was intentional.

This lesson to lawyers, who may not read the whole story, is a law lecture. It may be added that Lincoln first determined his client was not guilty, and having settled that, he knew the story was one made up for a purpose, and that purpose he was bound to discover.

As a reader of trials for years, this one presents as keen interest and displays as much sagacity of counsel as any I have found. Many others were more elaborate in detail, many contain passages of wit and arguments of rare eloquence, some of masterful logic, yet none were so great or so ably conducted as to overshadow this simple victory by a young country lawyer, who lived to be the leader of a nation, and filled with honor the highest station in the world. J. W. DONOVAN.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES ANSWERED.

QUERY NO. 7 [*27 Cent. L. J. 156.*]

1. Has a police court of a city of the fourth-class in the State of Missouri jurisdiction to try and punish for petit larceny? Can it pass a valid ordinance fixing a penalty for that offense, and under such ordinance arrest and punish for such offense? 2. Can a police court in the State of Missouri deny defendant the right of trial by jury? Cite authorities. S.

Answer. 1. A city has no power beyond that conferred on it by charter: City of St. Louis v. Weber, 44 Mo. 547. We find no grant of power relative to petty larceny: 2 Rev. Stat. Mo. §§ 4939-4993. Such court has no jurisdiction over State offenses: 2 Rev. Stat. Mo. §§ 4582, 4989. 2. The right of trial by jury can be denied by such courts for offenses cognizable by them: *Ex parte* Kiburg, 10 Mo. App. 442. J. B.

QUERY NO. 8 [*27 Cent. L. J. 179.*]

John Doe was indicted for burglary and grand larceny. The jury found him guilty as indicted. His counsel moved in arrest of judgment for want of expressed felonious intent in the indictment. Judge M, of Cheyenne, presiding, held the objection fatal, but further ruled that the indictment was good for statutory house-breaking, and he therefore sentenced the defendant accordingly. In brief, John Doe was found guilty by a jury of the felony of burglary and grand larceny; Judge M sentenced him for the misdemeanor of house-breaking. Is the sentence good? LEY.

Answer. From the statement it appears that the

court held that the indictment charged legally but one offense, and the jury's verdict does not conflict therewith. The fact that there was superfluous matter in the indictment does not vitiate it nor the sentence: 1 Bishop Crim. Proced. § 440. E. J.

QUERY No. 9. [*27 Cent. L. J. 228.*]

Parties wish to open a public road along the corporation line of a city of the fourth-class in Missouri; one-half will lie without and one-half within the city limits. Is the county court the proper body to take charge of the matter? If not, what body? E.

Answer. The city has the power to open as a street that proportion of the proposed road which lies within its boundaries: 2 Rev. Stat. Mo. 4940; Hannibal v. Hannibal, etc. R. Co., 49 Mo. 480. The city, however, cannot assess for such improvement any land lying outside the city limits: Wells v. Weston, 22 Mo. 384. Since we find no law giving such city exclusive control of its streets, the power given by the general law to the county court to open such road remains in the county court: Baldwin v. Green, 10 Mo. 410; 2 Dill. Mun. Corp. §§ 676-679. The county court is the proper body to act in the matter, since it alone can do justice in the premises. W. T.

RECENT PUBLICATIONS.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXIII. Maritime Law. Vol. XXIV. Name—Purser of the Navy. St. Louis, Mo.: The Gilbert Book Company. 1888.

The volumes of this valuable series have been somewhat irregularly issued, but we think that its publication is now drawing to a close. We have so often commented upon the merits of this admirable collection that further commendation would be superfluous. We need only add that the volumes before us are fully up to the standard of the series, and that the subjects which are treated are replete with interest to all members of the profession.

JETSAM AND FLOTSAM.

SENTIMENT AND BUSINESS.—Young man: "I cannot understand, sir, why you permit your daughter to sue me for breach of promise; you remember that you were bitterly opposed to our engagement because I wasn't good enough for her, and would disgrace the family." Old man—"Young man, that was sentiment; this is business."

A STERN London justice cast his eyes down on a professional vagrant who had been before him many times, and gravely remarked to the culprit: "Don't you think you have been arraigned before this court often enough? You have already been before me half a dozen times this year." The vagrant, far from being abashed by the court's frown and harsh tones, replied:

"Come, now, judge, none of that. Every time I've been here I've seen you here. You're here more than I am People who live in glass houses shouldn't throw stones."

A JUSTICE in Indiana, who had endeavored vainly to recover $20 he had loaned an acquaintance, had the latter before him as a witness recently and managed to quietly stir him up to an outburst of ire that just fitted a fine of $20 for contempt of court. The justice, who remained cool and collected (the $20), may be said to have got in his fine work.

"Sir," said the judge, "I commit you to jail for ten days for contempt of court."

"Better make it ten years, judge," was the response. "I couldn't begin to get over my contempt in less than that.—*N. Y. Sun.*

AS AN instance showing why some members of the bar are sometimes dubbed "necessity," we submit the following: Mr. C——, county attorney of a Kansas county, commenced an action against an offender on the charge of petit larceny. The defendant, through his attorney, filed an affidavit for a change of venue, which, against the strenuous objection of the county attorney, was granted, and the case sent to Mr. B——, another justice of the same county. When the case was called for trial before Mr. B——, the county attorney, wishing to still object to the change having been granted, moved "that this court do not proceed to the trial of this case." To this, of course, defendant's attorney made no objection, and thereupon the justice, Mr. B——, dismissed the case at the costs of the complaining witness, much to the surprise of the county attorney and the complaining witness. We now understand the county attorney says he made the motion thinking, of course, it would be overruled, and wishing to save the point for the district court. Need we add that Mr. C—— is a candidate for re-election this fall, and will doubtless be elected.—"*Vox populi vox dei est.*"

THE following is a copy of the body of an indictment found by the grand jury of Lawrence county, Ky., at its October Term of the Criminal Court: "The grand jury of Lawrence county, in the name and by the authority of the Commonwealth of Kentucy, accuse —— of the offense of malicious mischief, committed as follows: The said ——, on the 10th day of September, A. D. 18—, in the county and circuit aforesaid, did unlawfully, willfully and maliciously kill and destroy one pig, the personal property of George Pigg, without the consent of said Pigg, and said pig being of value to the aforesaid George Pigg. The pig thus killed weighed about twenty-five pounds, and was a mate to some other pigs that were owned by said George Pigg, which left George Pigg a pig less than he (said Pigg) had of pigs, and thus ruthlessly tore said pig from the society of George Pigg's other pigs, against the peace and dignity of the Commonwealth of Kentucky."